United States Court of Appeals

for the Second Circuit

APPENDIX

ORIGINAL

75-7600

United States Court of Appeals

For the Second Circuit

B

COLUMBIA BROADCASTING SYSTEM, INC.,
Plaintiff-Appellant,

against

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York

P/S

JOINT APPENDIX

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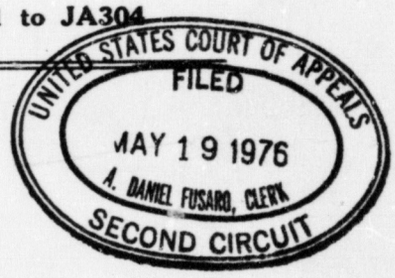

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/7/70 REFERRED TO LASKER, J. for ALL purposes.

CIVIL DOCKET

UNITED STATES DISTRICT COURT

JUDGE LASKER

JA 1 (Lasker)

69 CIV. 5740

Rule 2

:mand da

:UMBIA BROADCASTING SYSTEM, INC.,

Plaintiff,

-against-

:RICAN SOCIETY OF COMPOSERS, 'HORS AND PUBLISHERS, STANLEY AMS, as President of American :iety of Composers, Authors and)lishers, HAROLD ARLEN, SAMUEL BER, CARL FISCHER, INC., CHAPPELL O., INC., CY COLEMAN, EDWIN H. RIS & CO., INC., ELKAN-VOGEL ., ESSEX MUSIC, INC., FAMOUS SIC CORP., G. SCHIRMER, INC., RTON GOULD, ARTHUR HAMILTON, NRY N. MANCINI, MCA, INC., PETER NNIN, MILENE MUSIC, INC., ROBBINS SIC CORPORATION, RICHARD RODGERS, THUR SCHWARTZ, SHAPIRO, BERNSTEIN CO., INC., WARNER BROTHERS-7 ARTS C., NED WASHINGTON, on behalf of mselves and all other members of rican Society of Composers, thors and Publishers, (BROADCAST -12-30-70 SIC INC.) AL GALLICO MUSIC CORP., UL ANKA, ASSOCIATED MUSIC PUB-SHERS, INC., JERRY BOCK, DUCHESS SIC CORP., FRED EBB, EDWARD B. RKS MUSIC CORP., NORMAN GIMBEL, ELDON HARNICK, HILL AND RANGE NGS, INC., HOLLIS MUSIC, INC., HN KANDER, CHARLES KOPPELMAN, CLEN MUSIC, INC., PEER INTERNA-ONAL CORPORATION, DON RUBIN, REEN GEMS-COLUMBIA MUSIC, INC., SEPH STEIN, SUNBEAM MUSIC, INC., ART MUSIC CORP., on behalf of emselves and all others who have anted Broadcast Music Inc. the ght to license to third parties ndramatic performing rights of eir copyrighted music,

Defendants.

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One Wall St. NY WH 3-6500

Simpson Thacher & Bartlett
One Battery Park Plaza N.Y. (MCA, Inc. and (Duchess Music Co

Linden and Deutsch (for G. Schirmer, Inc. and Associated Music Publishers, Inc.(
~~597 Fifth Ave. NY 10017~~ PL 8-1100
110 East 59th St.

Paul Weiss Goldberg Rifkind Wharton & Garrison
(for Cy Coleman, Arthur Hamilton, Arthur Schwartz and Ned Washington) 345 Park Ave. NY 10022

Thacher & Bartlett (for Dutchess Music) One Battery Plaza

DATE	NAME OR RECEIPT NO.	REC.	DISB.
12/31/69	Gureth S.	15 —	
1/2/70	U.S. Tr		15 —

asis of Action:
Anti-trust Laws

tion arose at:

Docket fee

Witness fees

Depositions

5/7/70 REFERRED TO JUDGE LASKER for ALL purposes. JA 2

69 Civil 5740 C.B.S. vs. American Society of Composers et al 69 Civil 5740

Rec'd

DATE	PROCEEDINGS	Date Order Judgment No
Dec.31,69	Filed complaint and issued summons.	
Jan.15-70	Filed Notice of taking Deposition.	
Jan.19-70	Filed Notice of Examination of Frank Stanton, Pres. of Plaintiff etc.	
Jan/29/70	Filed stip and order that time for deft Warner Bros to answer to the complaint is extended to 2/26/70 and depcsition of defts Warner Bros is extended as indicated. Cooper J.	
Jan/29/70	Filed stip and order that time for defts MCA and Duchess music to answer to the complaint is extended to 2/26/70 Cooper J.	
Jan/30/70	Filed stip and order that time for Deft ASCAP and defts named in paragraph 6 of thecomplaint ot answer to the complaint is extended to 2/26/70 etc., Ryan J.	
Jan/30/70	Filed stip and order tha time for deft Broadcast Music Inc and Charles Koppelman and Don Rubim to answer to the complaint is extended to 2/26/70 etc.,, Cooper J	
Feb.3-70	Filed stipulation and order adjourning deft. Edward B.Marks Music Corp.'s time to answer complaint to 2/26/70; adjourning deft. Sheldon Harnick's time to answer complaint to 2/26/70, etc. So ordered. Cooper, J.	
Feb 9-70	Filed stip & order extending Gimbel's time to ans to 2-26-70 - Peer's time to ans to 2-26-70 & Stein's time to ans to 2-26-70 - Mansfield,J	
Feb.13-70	Filed Order extending defendant's time to answer complaint to 2/26/70. So ordered. Mansfield, J. (defendant Screen Gems- Columbia Music,Inc.)	
Feb.13-70	Filed stipulation and order extending time of deft. Al Gallico Music Corp. to answer complaint to 2/26/70, also extending time of deft. Fred Ebb and Unart Music Corp. to answer complaint to 2/26/70 So ordered. Mansfield, J.	
Feb.25-70	Filed stipulation and order extending certain defendants time to answer complaint to 3/12/70; further stipulated that the depositions previously adjourned are further adjourned to 3/11/70. So ordered. McLean,J.	
Feb 27-70	Filed stip & order extending defts MCA & Duchess Misic's time to ans to 3-12-70 McLean,J	
Feb 27-70	Filed stip & order extending deft Warner Bros' time to ans to 3-12-70 - depositions of Warner Bros are adjourned - W. Paley to 4-8-70 - Dr. Stanton to 4-10-70 - R. Jencks to 4-15-70 - R. Wood to 4-17-70 - C. George to 4-22-70 - Mc Lean,J	
Mar.4-70	Filed stipulation and order extending deft. ASCAP and defts. named in paragraph 6 of complaint time to answer or make any motion, to 4/6/70. So ordered.McLean,J.	
Mar.9,70	Filed deft Broadcast Music Inc. Interrogatory to pltff.	
Mar.6-70	Filed Order extending defendant's time to answer complaint to 3/12/70. So ordered. McLean, J.	
Mar.11-70	Filed stipulation and order extending certain defendants time to answer complaint to 4/6/70.,etc. So ordered. Wyatt, J.	
Mar.13,70	Filed stip and order that time for deft's MCA, Inc. and Duchess Music Corp. to Answer the complaintbe extended to 4-6-70 So Ordered Wyatt J.	
Mar.16-70	Filed stipulation and order extending time to answer complaint to 4/6/70. So ordered. Wyatt, J.	
Mar.18,70	Filed stip and order that time for deft Associated to Answer be extended to 4-6-70 So Ordered Wyatt J.	
Mar.19-70	Filed Plaintiff's Interrogatories addressed to Broadcast Music Inc.	
Mar.19-70	Filed Plaintiff's Interrogatories addressed to American Society of Composers, Authors and Publishers.	
Mar.20-70	Filed stipulation and order extending deft. American Society of Composers, Authors and Publishers's time to answer complaint or make motion to 4/27/70. So ordered. Wyatt, J.	
Mar.20-70	Filed stipulation and order extending pltf. C B.System,Inc.'s time to object to Interrog. to 4/6/70,etc. So ordered. Wyatt, J.	
Mar.27-70	Filed stipulation and order that stipulations as filed were intended and are deemed to include Stanley Adams, named a deft. in complaint as Pres. of ASCAP. So ordered.	

D REFERRED TO JUDGE LASKER for ALL purposes.

69 CIVIL 5740 Columbia Broadcasting System, Inc. vs. American Society of Composers, etc. JA 3 Page 3

69 Civil 5740

JUDGE LASKER Rule 2

DATE	PROCEEDINGS
Mar.30-70	Filed stipulation and order extending time for ASCAP to object to pltf's. Interrogs. to 5/4/70. So ordered. Bryan, J.
Apr.1-70	Filed order extending deft. Screen Gems-Columbia Music, Inc.'s time to answer complaint to 4/6/70. So ordered. Bryan, J.
Apr.2-70	Filed stipulation and order extending CBS's time to object to Interrog. of deft. Broadcast Music, Inc., etc. So ordered. Bryan, J.
Apr.3,70	Filed stip and order that time for deft to Answer the complaint be extended to 4-27-70 So Ordered. Bryan J.
Apr.3,70	Filed stip and order that time of deft Warner Bros. Inc. to Answer the complaint be adjourned to 5-6-70 So Ordered. Bryan J.
Apr.7-70	Filed ANSWER of Screen Gems-Columbia Music, Inc. to complaint. DHH
Apr.7-70	Filed ANSWER of defts. Broadcast Music, Inc. and Al Gallico Music Corp., Paul Anka, Jerry Bock, Fred Ebb, Edward B. Marks Music Corp., etal to complaint, and counterclaims. HH&R
Apr.6,70	Filed deft attys notice of change of address.
Apr.14,70	Filed stip and order that time for deft Associated to Answer be extended to to 4-27-70 So Ordered. MacMahon J.
Apr.16,70	Filed pltff's Interrogatories & Answers to
Apr.24-70	Filed stipulation and order extending ASCAP'S, Stanley Adams and defts. named in paragraph 6 of complaint, time to answer to 5/7/70. So ordered. Tenney, J.
Apr.28-70	Filed stipulation and order extending deft. Broadcast Music Inc.'s time to object to interrogs. to 5/13/70; and extending deft. Broadcast Music's time to answer the aforesaid interrogs. to 5/18/70. So ordered. Tenney, J.
Apr.28-70	Filed stipulation and order extending ASCAP's time to object or answer interrogs. to 5/25/70. So ordered. Tenney, J.
Apr.28-70	Filed stipulation and order extending plaintiff's time to reply to counterclaims to 5/13/70; and adjourning deposition of plaintiff to 6/3/70. So ordered. Tenney, J.
May 1-70	Filed stipplation and order extending defts. MCA, Inc. and Duchess Music Corp.'s time to answer complaint to 5/7/70. So ordered. Tenney, J.
May 1-70	Filed stipulation and order extending ASCAP's, Stanley Adams and certain other defendant's time to answer complaint to 5/25/70. So ordered. Tenney, J.
May 5-70	Filed ANSWER of Associated Music Publishers, Inc. to complaint. L&D
May 5-70	Filed ANSWER of G. Schirmer, Inc. to complaint. "
May 5-70	Filed stipulation and order extending deft. Broadcast Music Inc.'s time to object to interrogs. to 5/25/70; also extending deft. Broadcast's time to answer interrogs. to 5/25/70. So ordered. Metzner, J.
May 7-70	Filed stip adjourning motion to asign a judge for all purposes to 4-14-70
May 7-70	Filed stip adjourning motion to assign a judge for all purposes to 4-17-70
May 7-70	Filed stip adjourning motion to assign a judge for all purposes to 3-25-70
May 7-70	Filed deft Broadcast's memo in oppsition to motion to assign judge
May 7-70	Filed affidavit of Broadcast in opposition to motion to assign judge
May 7-70	Filed pltff*s memo in rebuttal to motion to assign judge
May 7-70	Filed pltff's memo in oppositon to motion to assign judge
May 7-70	Filed pltff's memo in opposition to moiton to assign judge
May 7-70	Filed deft American Society*s memo in support of motion to assign judge
May 7-70	Filed pltff's memo in rebuttal to assignment of judge.
May 7-70	Filed Notice of Motion re: Rule 2 Judge.
May 7-70	Filed MEMO.END. on motion papers re: Rule 2 Judge filed this day. Respectfully referred to Judge Weinfeld, Sugarman, Ch.J.
May 7-70	Filed MEMORANDUM AND ORDER. This matter is referred to Judge Morris E. Lasker for ALL PURPOSES, pur. to Genl. Rule 2(b). Weinfeld, J. (mailed notice)

D. C. 109 Criminal & Bankruptcy Continuation Sheet

continued next page

DATE	PROCEEDINGS
May 7-70	Filed stipulation and order adjourning deft. Warner Bros. Inc.'s time to answer complaint to 5/25/70. So ordered. Metzner, J.
May 8-70	Filed stipulation and order extending defts. MCA, Inc. and Duchess Music Corp.'s time to answer complaint to 5/25/70. So ordered. Metzner, J.
May 15-70	Filed stipulation and order extending certain defendant's tirs to reply to counterclaims to 5/19/70. So ordered. Lasker, J.
May 14-70	Filed Order referring this case to JUDGE LASKER for ALL PURPOSES. WEINFELD, J.
May 20-70	Filed change of address of Linden and Deutsch to 110 East 59th St. NY 10022
May 22-70	Filed Reply to counterclaims.
May 25-70	Filed stipulation and order adjourning deposition of plaintiff to 6/23/70. So ordered. Lasker, J.
May 25-70	Filed stipulation and order extending time of certain defendants to answer complaint to 5/29/70. So ordered. Lasker, J.
May 25-70	Filed stipulation and order extending time for ASCAP to answer or object to pltf's.interrogs.dated 3/18/70 to 6/4/70. So ordered. Lasker, J.
May 27-70	Filed Notice of Appearance for Cy Coleman, Arthur Hamilton, Arthur Schwartz and Ned Washington.
May 26-70	Filed stipulation and order extending deft. Broadcast Music Inc.'s time to answer or object to interrogs. to 6/12/70. So ordered. Lasker, J.
May 27-70	Filed Stipulation and Order extending defts. Cy Coleman, Arthur Hamilton, Arthur Schwartz and Ned Washington's time to answer complaint to 6/5/70. So ordered. Lasker, J.
May 28-70	Filed ANSWER of Dutchess Music Co. to complaint. ST&B
May 28-70	Filed ANSWER of American Society of Composers, Authors and Publishers, Stanley Adams, Harold Arlen, Samuel Barber, etc. to complaint, and counterclaims of ASCAP and certain ASCAP Members. S&C
June 1-70	Filed ANSWER of certain defendants, and counterclaims of ASCAP and certain ASCAP members. S&C
June 1-70	Filed ANSWER of certain defendants, and counterclaims of ASCAP and certain ASCAP members. S&C
June 3-70	Filed ANSWER of MCA Inc. to complaint.
June 3-70	Filed Notice of Motion re: Pre. Inj., etc. Ret. 6/17/70.
June 3-70	Filed Memorandum in support of BMI motion for pre.inj.
June 11-70	Filed ANSWER of Warner Bros. Inc. to complaint. S&C
June 15,70	Filed stip and order that time of deft Warner Bros. Inc. to Answer the complaint be extended to 6-10-70: the deposition of deft Warner Bros. Inc. be adjourned as indicated. Lasker J.
June 15,70	Filed stip and order that time for ASCAP to answer or object to pltff's interrogatories be extended to 6-19-70 Lasker J.
June 15,70	Filed stip and order that the return date of motion made by deft Broadcast Music Inc. be adjourned from 6-17-70 to 7-1-70 Lasker J.
June 15,70	Filed stip and order that time of deft Broadcast Music Inc. to Answer to interrogatories of pltff be adjourned to 6-19-70 Lasker J.
June 15,70	Filed stip and order that time of deft Cy Coleman, Arthur Hamilton, Arthur Schwartz and Ned Wahhington to Answer the complaint be extended to 6-12-70 Lasker J.
June 15,70	Filed order that NBC shall be joined as a deft to said counterclaims, etc. Lasker J.
Jun 16,70	Filed deft's Coleman, Hamilton, Schwartz and Washington ANSWER to complaint. PWCF
June 17-70	Filed stipulation and order amending the Answer and Counterclaims as indicated. So ordered. Lasker, J.
June 18-70	Issued additional summons as per order of Judge Lasker.
June 19-70	Filed AMENDED ANSWER of WARNER BROS. INC. to complaint. S&
~~June 19-70~~	~~Filed Affidavit of Services.~~
~~June 19-70~~	~~Filed Order of Settlement. U.S.A. has agreed to pay pltf. $570.85 without int. or costs Ordered that atty's fees are fixed at $125. and disbursements of $22.36; Upon pay as provided, this action is to be dismissed with prejudice and without costs. Lasker (mailed notice).~~

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69 CIVIL 5740 COLUMBIA BROADCASTING SYSTEM INC. vs. AMERICAN SOCIETY OF COMPOSERS, ETC. 69 CIVIL 571

JA 5

D. C. 110 Rev. Civil Docket Continuation

DATE	PROCEEDINGS
June 22-70	Filed Notice of Appearance for National Broadcasting Co. Inc.
June 22-70	Filed stipulation and order extending ASCAP's time to answer or object to pltf's. Interrogatories to 7/31/70;,etc. So ordered. Lasker, J.
June 22-70	Filed stipulation and order that Broadcast Music Inc. will serve upon CBS Inc. no later than 6/24/70 papers as indicated. So ordered. Lasker, J.
June 23-70	Filed additional summons with proof of service upon Sullivan & Cromwell of a reply to counterclaims of defts-counterclaimants.
June 23-70	Filed stipulation and order adjourning plaintiff's time to reply to counterclaims to 8/5/70. So ordered. Lasker, J.
June 26-70	Filed Partial Answers to Interrogatories.
Jul 2-70	Filed deft ASCAP'S ans. to interrogs
Jul 2-70	Filed exhibits to ASCAP'S an to interrogs
Jul 6-70	Filed stipulation and order adjourning time to reply tocounterclaims of certain defendants-counterclaimants to 8/5/70. So ordered. Lasker, J.
Jul 7-70	Filed Affidavit of Michael Dann.
Jul 7-70	Filed Affidavit of Donald Sipes.
Jul 7-70	Filed Plaintiff's Memorandum in opposition to BMI's Motion for pre.inj.
Jul 7-70	Filed one Envelope - IMPOUNDED IN VAULT ROOM 602. Lasker, J.
Jul 10-70	Filed deft's Coleman, Hamilton, Schwartz & Washington's memo
Jul 10-70	Filed letter dated 7-9-70 correcting the reply memo in support of BMI's motion for prel. injunction
Jul 10-70	Filed affidavit of service of reply memo of E. Cramer
Jul 10-70	Filed affidavit of service of reply memo of E. Cramer
Jul 10-70	Filed defts Broadcast Music's reply memo in support of prel. injunction
Jul 10-70	Filed reply affidavit of E. Cramer
Jul 10-70	Filed supplemental affidavit of H. Finkelstein
Jul 10-70	Filed affidavit in opposition to BMI's motion for prel. injunction
Jul 10-70	Filed pltff's memo in opposition to BMI's motion
Jul 10-70	Filed affidavit of D. Sipes
Jul 10-70	Filed affidavit of M. Dann
Jul 10-70	Filed in camera affidavit of A. Hruska
Jul 15-70	Filed Plaintiff's Rebuttal Memorandum in opposition to BMI's Motion for pre.Inj.
Jul 16-70	Filed stipulation and order the confidential status is hereby dissolved. So ordered. Lasker, J.
Jul30-70	Filed stip. & order extending time of counterdeft.(Nat'l. Broadcasting Co.,Inc.)d to answer defts' counterclaim (American Society of Composers,etc.) to 9-30-70.-Lasker,J.
Jul30-70	Filed stip. & order extending time of deft.(BMI) to answer pltffs. interrogatories to 9-22-70 & adjourning deposition of pltff. to 9-16-70.-Lasker,J.
Jul 31-70	Filed stipulation and order adjourning plaintiff's time to reply to counterclaims to 9/30/70.
Sept.14-70	Filed stip and order that depositions of persons named is adjourned as indicated. So Ordrred--Lasker, J.
Sept.16-70	Filed stip & order that deposition of pltff. is adj. from 9-16-70 to 10 16-70. So ordered. Lasker,J.
Sept 23-70	Filed Stip & Order that time for pltff to reply to the counterclaims of defts-counterclaimants is adj. to 10-22-70; the time for ASCAP to answer/object to pltff's interrogs dtd 3-16-70 other than those previously answered, is extended to 10-14-70. So Ordered: Lasker, J.
Sept.25-70	Filed stip & order that time of BMI to answer or object to pltff's interrogs is ext. from 9-22-70 to 10-14-70. So ordered. Lasker,J

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DATE	PROCEEDINGS	Date Ord Judgment
Sept.29-70	Filed summons with marshal's ret. SERVED:	
	American Society of Composers, Authors and Publby David Hochman on1/12/70.	
	Stanley Adams, as Pres. of ASCAP on 1/12/70.	
	Broadcast Music Inc. by Milton Adler on 1/7/70	
	Carl Fischer, Inc. by C.L.Carter, V.P. on 1/8/70.	
	Chappell & Co. Inc. by P.B.Wattenberg on 1/22/70.	
	Edwin H. Morris & Co. by P.Silvestri on 1/20.70.	
	Essex Music Co. by Alan S. Bergman, V.P. on 1/22/70.	
	Lamons Music Inc. by Sidney Herman, V.P. on 1/21/70.	
	G. Schirmer Inc. by C.A.Foy, Ex.V.P. on 1/22/70.	
	MCA Inc by Morris M.Schrier, V.P. on 1/12/70.	
	Robbins Music Corp. by Mr. Segelin, Secy. on 1/20/70.	
	Shapiro Bernstein & Co. by Murray Nagelberg, V.P. on 1/22/70.	
	Warner Brothers-7 Arts, Inc. by Sidney H.Levin, V.P.on 1/9/70.	
	Al Galleco Music Corp. by Miss L.Lande, Secy. on 1/20/70.	
	Associated Music Publishers Inc. by C.A.Foy, Ex.V.P. on 1/22/70.	
	Duchess Music Corp. by Morris M. Schrier, V.P. on 1/12/70.	
	Edwin E. Marks, V.P. on 1/20/70.	
	Hill & Range Songs, Inc. by Mrs.L. Walker, Bookkeeper on 1/21/70.	
	Hollis Music Co. by Alan S. Bergman, V.P. on 1/22/70.	
	Maclen Music Co. Inc. by R. Casper on 1/20/70.	
	Peer International Corp. by John J. Petersen, Treas. on 1/20/70.	
	Screen Gems Columbia Music Inc. by Jared Jussim, on 1/22/70.	
	Sunbeam Music Inc. - unable to serve.	
	Sunbeam Music Co. c/o Metromedia by Jay Morgenoptus, V.P. on 2/11/70.	
	Unart Music Co. by S. Benjamin on 2/4/70.	
	Elkan-Vogel Co, Inc. by Adolph Vogel, Pres. on 1/14/70 (Eastern Dist. Penna.)	
	Milene Music Inc. by John R. Brown V.P. on 1/26/70 (Middle Dist. Tenn.)	
	UNABLE TO SERVE Samuel Barber.	
	Cy Coleman by E.Colodne, Gen.Mgr. on 1/8/70.	
	UNABLE TO SERVE Morton Gould.	
	Peter Mennen by Mrs. B.Zyoston, Secy. on 1/7/70.	
	UNABLE TO SERVE NED WASHINGTON.	
	Paul Anka by John Anka c/o Spanka Music Inc. on 1/14/70.	
	Charles Koppelman personally on 1/7/70	
	Don Rubin personally on 1/7/70	
	Harold Arlen personally on 1/22/70.	
	Henry Mancini by Miss Barbara Yenter, Ex.Secy. on 1/26/70. (Central Dis. Calif.)	
	Arthur Hamilton personally on 1/21/70 (Central Dist. Calif.)	
	Norman Gimbel personally on 1/21/70 (Central Dis. Calif.)	
	Sheldon Harnick personally on 1/22/70.	
	John Kander personally on 3/25/70	
	Arthur Schwartz personally on 3/30/70	
	Richard Rodges personally on 1/20/70.	
	Jerry Bock personally on 2/12/70.	
	Fred Bock personally on 1/29/70.	
	Joseph Steen personally on 1/28/70.	
Sept 30 70	Filed stip & order that time for counterdeft. to reply to counterclaims of deft's counterclaimants, is adj. from Sept. 30, 1970 to 10 22-70. So ordered. Wyatt, J.	
Oct.15-70	Filed transcript of Record of Proceedings of July 10, 1970.	
Oct 15-70	Filed Stip & Order that the time of Broadcast Music Inc to answer, etc. re: interrogs of pltff dated 3-18-70 is ext. to Nov 16-70. So Ordered: Lasker, J.	

Cont'd on page #7

69 CIVIL 5740 JUDGE LASKER CBS vs. A.S.C.A.P. et al. RULE 2 69 CIV 5740 JA 7

D. C. 110 Rev. Civil Docket Continuation PAGE # 7

DATE	PROCEEDINGS
Oct 15- 70	Filed Stip & Order that time for A.S.C.A.P. to answer, or object to pltff's interrogs dtd Mar. 18-70 is ext. from 10-14-70 to Oct 21-70. The time for pltff to reply or move with respect to counterclaims of defts-counterclaimant is ext. from 10-22-70 to 10-29-70. So Ordered: Lasker, J.
Oct 19-70	Filed Stip & Order that deposition of pltff noticed by Broadcast Music Inc., for Mar. 11-70 is adj. to Nov. 19-70 So Ordered: Lasker, J.
Oct.22-70	Filed Edward M. Cramer Affdvt to Donald Sipes in Reply Affdvt.
Oct.22-70	Filed defts' BMI Memorandum in opposition to proposal that court license CBS to use BMI Music Pender te Lite
Oct 21-70	Filed Supplemental memorandum describing related litigation.
Oct 21-70	Filed A.S.C.A.P. memorandum of related pending cases in which it is a party.
Oct 21-70	Filed Affdvt of Amalya L. Kearse, atty for deft Broadcast Music Inc. re: additional information regarding parameters within which the amount of interim relief to be awarded to BMI is to be fixed.
Oct 21-70	Filed affdvt of Donald Sipes, Vice President of Business Affairs & Planning for the CBS TV Network.
Oct 21-70	Filed Supplemental affdvt of Milton Adler, General Atty for BMI, in support of motion of BMI for prelim. injunctive relief against the pltff.
Oct 21-70	Filed Pltff's rebuttal memorandum in opposition to BMI's motion for a preliminary injunction.
Oct.22-70	Filed deft ASCAP'S objections to pltff's interrogs
Oct.22-70	Filed ASCAP'S answers to pltff's interrogs.
Oct.22-70	Filed deft ASCAP'S answers to pltff's interrogs and supplementary answer to interrogs 18 and 22
Oct 23 70	Filed stip & order that time for counterdeft to reply to counter-claims of deft's counterclaimants, is adj from 10 22 70 to 10 So ordered Lasker J.
Oct 23-70	Filed Pltff's memorandum with respect to the conditioning of preliminary injunc relief on the grant of a license.
Oct [illegible]-70	Filed Pltff's comments on BMI's submissions regarding an interim fee.
Oct.27-70	Filed Opinion # 37149- The motion for a preliminary injunction is granted to the extent and under the conditions set forth. Settle order and judgment on notice. Lasker, J. M/N
Oct.27-70	Filed letter to Mr. Kuriansky from Cravath, Swaine & Moore dated 10-23-70.
Oct.27-70	Filed letter to Mr. Kuriansky, from Sullivan & Cronwell dated 10-26-70
Oct.27-70	Filed letter to Mr. Kuriansky, from Hughes, Hubbard & Reed , dated 10-26-70
Nov.2-70	Filed pltff's REPLY to Counterclaims of certain defts'
Nov.4-70	Filed letter to Judge Lasker's Chambers from Stroock & Stroock
Nov. 4-70	Filed letter to Judge Lasker's Chambers from Linden & Deutsch.
Nov.4-70	Filed letter to Judge Lasker's Chambers from David H. Horowitz.
Nov. 4-70	Filed letter to Judge Lasker's Chambers from Simpson Thacher & Bartl
Nov 9 70	Filed Stip & Order that the depositions pursuant to notice of deft Warner Bros., Inc. dtd 1-13-70 of persons named are adjourned as follows: Wm Paley 12-15-70, Dr. Frank Stanton 12-17-70, Richard Jancks 12-21-70, Robert Woods 12-23-70, Clark George 12-28-70, without prejudice to pltff's right to move for a protective order with regard to said notice. So Ordered: Lasker, J.
Nov.4-70	Filed counterdefendant National Broadcasting System, Inc . REPLY to counterclaims
Nov 5-70	Filed deft BNI Inc. preliminary memorandum in support of an upward adjustment of
Nov 17-70	Filed stip & order bet. pltff & deft BMI that deposition of pltff is adjourned f 11-19-70 to 12-22-70-So ordered-Lasker,J.
Nov 17-70	Filed stip & order that time for deft BMI to answer or object to interrogs. is e from 11-16-70 to 12-16-70-So ordered-Lasker,J

DATE	PROCEEDINGS	Date Order or Judgment Note
Nov.18-70	Filed Ronald Pollock, Affdvt. of Service by mail. Served Preliminary Memorandum etc. addressed to as indicated.	
Nov.23-70	Filed stip. and order that time for defts'-counterclaimants to reply counterclaims of counterdefendant is adjourned from 11-23-70 to 12-14-70. So Ordered: Lasker, J.	
Nov.30-70	Filed stip & order that deft. Morton Gould is hereby deemed to be served with a summons & the complaint herein & adopts the answer & counterclaims of deft's-counterclaimants, etal dated May 28,70, as his answer & counterclaims herein. So ordered. Lasker,J.	
Dec.14-70	Filed affdvt of Service of Philip Fitzpatrick, by mail	
Dec.14-70	Filed affdvt. of Service of Philip Fitzpatrick, by mail	
Dec.14-70	Filed stip & order that time of deft's-counterclaimants to reply or make any motion to counterclaims of counterdeft. is adj. from 12-14-70 to 12-23-70. So ordered. Lasker,J.	
Dec 17- 70	Filed Stip & Order between pltff & deft. Morton Gould that the reply of pltff to the counterclaims of defts ASCAP et al be deemed its reply to the counterclaims of Morton Gould adopted by order of this Court entered 11-25-70. So Ordered -Lasker J.	
Dec 17- 70	Filed Stip & Order between pltff and deft BMI that the deposition of pltff noticed by BMI for 3-11-70 is adjourned from 12-22-70 to 2-9-71 - So Ordered - Lasker, J.	
Dec 17- 70	Filed Stipulation & Order between pltff and deft. BMI that the time of BMI to answer, etc. re: interrogs of pltff is ext. to 2-3-71. So Ordered: Lasker J.	
Dec 23 70	Filed Stip & Order that the time for defts-counterclaimants to reply or make any motion in relation to the counterclaims of counterdeft is adj. to Jan 6- 1971. So Ordered: Lasker, J.	
Dec 28 70	Filed Stip & Order that depositions of Wm. Paley, Dr. Frank Stanton, Richard W. Jencks, Robert Wood, Clark B. George are adjourned without prejudice to pltff's right to move for a protective order with regard to notice of deft Warner Bros. Inc. to a date 30 days after deft Warner Bros Inc. notifies pltff of its intention to take said depositions. So Ordered - Lasker, J.	
Dec.30-70	Filed supplemental Opinion #37292: Accordingly, my opinion of October 27-70 is modified to provide that, in the event the parties are unable to agree upon a fee for any year during the pending litigation commencing on or after January 1,1971, the court shall set such fee in accordance with the provisions of an order and judgment being filed simultaneously herewith. The fee so set shall remain fixed for that year without further adjustment. Lasker,J.	✓ m/n
Dec 30 70	Filed Order & Judgment that counterclaims averred in the answer of BMI dated April 6 1970 are hereby voluntarily dismissed with prejudice & without costs Lasker J. Judg Ent Clerk Ent 1 5 71 m	
Jan.6-71	Filed stip and order that the time for defts'-counterclaimants and to reply or make any motion in relation to the counterclaims of counterdefendant is adjourned from 1-6-71 to 1-13-71. So Ordered: Lasker, J.	
Jan 14-71	Filed REPLY of ASCAP AND CERTAIN ASCAP MEMBERS TO THE COUNTERCLAIMS OF COUNTER DEFT NATIONAL BROADCASTING CO., INC.	S&C
Feb.3-71	Filed stip and order that the deposition of pltff is ext. from 2-9-71 to 3-9-71. So Ordered: Lasker, J.	
Feb 5-71	Filed stip & order that the time of BMI to answer interrogs 1, 2,3,10,11,13,14,15,21,26 and 28 is extended to 2-17-71 etc. (see order in file)-so ordered- LASKER, J.	
Feb.9-71	Filed pltff's notice of motion Re; Maintained as a class action. Ret. date and time to be fixed by the court, Rm.110, Before: Lasker, J.	
Feb.9-71	Filed pltff's Memorandum in support of motion for class motion.	7

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D. C. 110 Rev. Civil Docket Continuation JUDGE LASKER JA 9 [illegible] 2

DATE	PROCEEDINGS
Feb.11-71	Filed defts' BMI Memorandum in support of an 18.3% upward adjustment of interim fee for 1970
Feb.17-71	Filed defts'-counter-claimants' interrogs. addressed to Columbia Broadcasting System, Inc. ("CBS")
Feb.17-71	Filed defts'-counterclaimants' interrogs addressed to National Broadcasting Co. ("NBC")
Feb.19-71	Filed BMI'S answers to pltff's interrogs.1,2.3.10.11.13.14.15,21, 26 and 28.
Mar.5-71	Filed stip and order that the deposition of pltff by deft. Broadcast Music Inc., is ext. from 3-9-71 to 4-9-71at the time and place specified in said Notice, without prejudice to pltff's right to move for a protective order. Lasker, J.
Mar.15-71	Filed defts' Counterclaimants' Memorandum in opposition to CBS' Motion for a class determination
Mar.15-70	Filed stip and order that the time for pltff to answer interrogs. of defts'-Counterclaimants, is ext. from 3-15-71 to 4-27-71. Lask
Mar.15-71	Filed stip and order that the time NBC to answer interrogs. of defts' Counterclaimants is ext. 3-15-71 to 4-27-71. Bonsal, J.
Mar 17-71	Filed defts Broadcast Music Inc. et al affdvt of service.
Mar.26-71	Filed pltff's reply memorandum in support of its motion for a class action determination
Apr.1-71	Filed deft. BMI'S answers to pltff's interrogs. etc.
Apr.5-71	Filed defts' Broadcast Music, Inc., et al. affdvt. and notice of motion Re; Prompt Trial of Liability issues in complaint.
Apr.5-71	Filed defts' BMI Inc. ET al Memorandum in support of motion
Apr.9-71	Filed stip and order that the deposition of pltff. noticed by BMI for 3-11-71 is adjourned from 4-9-71 to the tenth day following the filing of a decision of the motion made by BMI by Notice of Motion dated 4-2-71. Unless such date is inconsistent with such decision, at the time and place set forth in the original Notice, without prejudice to pltff's right to move for a protective order with regard to said Notice. Lasker, J.
Apr.20.71	Filed Michael J. Kelly, Affdvt. of personal service of Notice of Motion , Memorandum etc. dated 4-2-71.
Apr.20.71	Filed Michael Fortino, Affdvt. of personal service of Notice of Motion, Memorandum, etc. dated 4-2-71.
Apr.21-71	Filed Herman Finkelstein, affdvt. for deft. "ASCAP" in opposition to the motion of Broadcast Music, Inc.
Apr.21-71	Filed ASCAP'S Memorandum in opposition to BMI'S Rule 42(b) Motion
Apr.21-71	Filed pltff's Memorandum in response to BMI'S MOTION for severanve of the ASCAP Counterclaims and for a prompt trial.
Apr.27-71	Filed ASCAP'S Memorandum in answer to CBS' Memorandum with respect to BMI'S Motion for severance and for a discovery and trial schedule
Apr.28-71	Filed pltff's reply to ASCAP'S memorandum in opposition to BMI'S Rule 42 (b) motion.
Apr.28-71	Filed BMI reply memorandum in support of motion for prompt trial
Apr.28-71	Filed reply affidavit of A.L. Rearse in support of motion.
Apr.28-71	Filed reply affidavit of E.M. Cramer in support of motion.
Apr.29-71	Filed stip and order that the time for pltff to answer interrogs. of defts' counterclaimants Am. Society of Composer, Authors and Publishers, et al. is ext.from 4-27-71 to 5-4-71. Lasker, J.
May 4-71	Filed affdvt of service by mail on 4-27-71 of a reply to ASCAP'S memorandum in opposition
Aug 24-71	Filed affdvt & stip &order of substitution of atty. for deft American Society of Composers-So ordered-Lasker,J.

/c

DATE	PROCEEDINGS	Date Order or Judgment Noted
May 17-71	Filed stip and order that without prejudice to pltff's right to make application to the Court for further time, that pltff's time to answer interrogs of defts' counterclaimants American Society of Composers, Authors and Publishers, et al., is ext. from 5-4-71, to 6=1-71. Lasker, J.	
Jun 3-71	Filed Counterdefendant's response and objections to defts counterclaimants interrogs.	
Jun 3-71	Filed pltff's answers to the interrogs., of defts- counterclaimants, American Society of Composers, Authors & Publishers("ASCP") et al dated 2-11-71	
Jun 3-71	Filed stip and order that pltff's time to answer the interrogs., or to object with respect to the interrogs. of defts counterclaimants, American Society of Composers, etc. dated 2-11-71 is extended from 6-1-71 to 6-15-71 Lakser J.	
Jun 16-71	Filed Transcript of record of proceedings, dated 3-25-71	
Jun 17-71	Filed pltff's Notice of Motion. Re: Protective order extending its time to answer and object to the interrogs. of deftscounterclaimants, American Society of Composers, etc.	
Jun 17-71	Filed pltff's Memorandum in support of its motion for a protective order.	
Jun 17-71	Filed pltff's objections to the Interrogs. of deft counterclaimants American Society of Composers etc.	
Jun 28-71	Filed defts' Notice of Motion. Re: Summary Judgment dismissing the complaint, at a time and place to be determined by the Court.	
Jun 28-71	Filed Memorandum of defts Cy Coleman in support of motion for summary judgment.	
Jul 1-71	Filed ASCAP'S Memorandum in opposition to CBS' Motion for a Protective Order.	
Jul.16-71	Filed Opinion #37800; directing parties to proceed with discovery as set forth & until the rule 42(b)motion is decided discovery, shall be devoted to the evidence which would be needed if the rule42(b) motion were to be granted etc. Lasker,J.	
Jul.16-71	Filed Opinion #37801: The motion for a protective order is granted. Lasker,J. Mailed notice.	
Aug 23-71	Filed pltff's memorandum in opposition to defts' motion for summary judgment	
Aug 23-71	Filed pltff's statement under Rule 9g in opposition	
Aug 23-71	Filed Appendix to pltff's memorndum in opposition to deft's motion for summary judg.	
Aug 25-71	Filed affdvt of service by mail on 8-24-71 of a stip of substitution of atty.	
8-23-71	Filed Transcript of record of proceedings, dated 8-17-71	
Sep.28-71	Filed Order that the firm of Paul, Weiss, Rifkind, Wharton & Garrison be substitued as counsel for defts Morton Gould Adams, Harold Arlen, Samuel Barber, Calr Fischer Inc., Chappell Co. Inc.. Elkan Bogle, Inc. Essex Music Inc., Famous Music Corp., Peter Mennin, Milene Music Inc. Robbins Music Corp., Richard Rodgers, and Shapiro, Bernstein & Co. in place of the firm of Sullivan and Cromwell. Lasker J. M/n	
Oct 8-71	Filed stip and order that Paul. Weiss, Rifkind, Wharton & Garrison be substituted as attys' for defts Edwin H. Morris & Co. and Henry N.Mancini. Lasker J.	
Oct 13-71	Filed pltff's notice to take depositions of the following persons, as indicated.	
Oct 19-71	Filed pltff's rule 34 request no. 1 addressed to American Society of Composers, & Publishers (ASCAP)	
Oct 26-71	Filed stip and order that the following definitions shall apply to paragraph 2 as indicated. Lasker J.	
Nov.4-71	**Filed pltff's supplemental memorandum in opposition to ASCAP deft's motion for summary judgment.**	
Dec 17-71	Filed stip & order that the counterclaims asserted by the defts'-counterclaimants American Society Society of Composers,Authors & Publishers et al against counterdeft Nat. Broadcasting Co. & counterclaims asserted by counterdeft NBC against the above named defts'counterclaimants are dismissed with prejudice.so ordered-Lasker,	
Jan 20-72	Filed Opinion# 38200 ASCAP and the defts who are members of its board of directors move, pur. to rule 56, Fed. R. Civ. P., for summary judgment dismissing the complaint. For the reasons set forth in the opinion, the motion is denied. Las	

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D. C. 110 Rev. Civil Docket Continuation

DATE	PROCEEDINGS
Jan 31-72	Filed stip and order that time of pltff and deft Broadcast Music Inc. to request a change in the interim fee, pur to the Supplemental Opinion and Order of the Court dated 12-30-70 is extended from 1-30-72 to 2-14-72 Laskerj.
Dec. 28-71	*Filed Transcript of record of proceedings, dated 9-14-71*
Dec. 29-71	*Filed Transcript of record of proceedings, dated 9-14-71*
Feb. 25-72	Filed MEMORANDUM AND ORDER. By letter of 2-9-72, ASCAP requested the court to grant a certificate under 28 U.S.C. 1292 (b) permitting ASCAP to petition the court of Appeals for leave to appeal the denial of its motion for summary jud The application is denied, as indicated. Lasker J. -mailed notice.
Apr. 5-72	Filed BMI Memorandum in support of a 13.7% upward adjustment of interim fee for 1970, following attempts by BMI and CBS to reconcile tabulation differences.
Apr. 5-72	Filed defts Broadcast Music Inc, et al brief. Re: CTN use of BMI Music during 1969 and 1970.
May 9-72	Filed affdvt of service
June 12-72	Filed ORDER that motion is granted to following extent (1) the issues as to whether defts' are liable herein under Sec. 1 or 2 of the Sherman Act & have misused copyrights shall be tried seperately from & prior to, issues concerning the nature & extent of the relief to be granted herein m/nLasker,J
Jun 14-72	Filed pltff's rule 34 request No. 1 addressed to MCA Inc.
Jun 14-72	Filed pltff's rule 1 addressed to Robbins Music Corp.
Jun 14-72	Filed pltff's rule 34 request No. 1 addressed to Chappell & Co. Inc.
Jun 14-72	Filed pltff's rule 34 request No. 1 addressed to Famous Music Corp.
Jun 14-72	Filed pltff's rule 34 request No. 1 addressed to Shapiro Bernstein & Co. Inc.
Jun 14-72	Filed pltff's rule 34 request No. 1 addressed to Essex Music Inc.
Jun 14-72	Filed pltff's rule 34 request No. 1 addressed to Essex Music Inc.
Jun 19-72	Filed pltff's notice to take depositions of the following persons as indicated.
Jun 21-72	Filed pltff's notice to take depositions of the following persons as indicated.
Jul.6-72	Filed stip. and order that the time for deft. MCA, Inc. to produce the documents is ext. from 7-14-72 to 7-20-72. Brieant,J.
Jul.13-72	Filed deft. ASCAP'S Response to pltff's Rule 34 Request
Aug.7-72	Filed Notice to take Depositions.
Aug.29-72	Filed defts' American Society of Composers, Authors and Publishers, et al notice to take deposition of William S. Paley,on 9-18-72, and other as indicated.
Sep.6-72	Filed pltff's Request No. 1 Addressed to All Publisher Defendants to produce and inspect documents.
Sep.14-72	Filed order that this action may be maintained as a class action. Notice to the members of the classes in the form annexed hereto as Exhibit A, which is hereby approved, shall be mailed by ASCAP and BMI to their respective members and affiliates no later than October 14, 1972. The law w firm of Paul,Weiss,Rifkind, Wharton & Garrison will represent members of ASCAP class; the law firm of Hughes Hubbard & Reed will represent the BMI class. Any member of the respective classes wihing to come into the action and appear through seperate counsel may so so no later than November 16, 1972. Lasker,J. M/N
Sep.15-72	Filed pltff's notice to take deposition of ASCAP, on 9-20-72 and other certain defts' as indicated.
Sep.15-72	Filed defts' Broadcast Music, Inc., et al. of William S. Paley,on 9-18-72 and other certain parties listed.
Sep.19-72	Filed pltff's affdvt. and notice of motion. Re. Protective Order Ret. Date and time to be set by the Court.
Sep.19-72	Filed pltff's Memorandum in support of motion for a Protective Order.

DATE	PROCEEDINGS	Date Ord Judgment
Sep.20-72	Filed defts' Carl Fischer,Inc., et al. Response to pltff's Rule 34 Request.	
Sep.21-72	Filed Response of Certain Publisher Defts' G. Schirmer,Inc. and Associated Music Publishers, Inc. to pltff's Rule 34 Request.	
Sep.21-72	Filed pltff's affdvt. and notice of motion. Re; Protective Order Ret. Date and time to be set by Court.	
Sep.21-72	Filed pltff's Memorandum in support of its motion for a Protective Order.	
Sep.21-72	Filed ASCAP, affdvt. and notice of motion for Protective Order.Ret. Date and time to be set by Court.	
Sep.21-72	Filed ASCAP'S Memorandum in support of motion for Protective Order	
Sep.21-72	Filed response of certain BMI Publisher Defts' Al Gallico Music Corp., et al. to pltff's Rule 34 Request.	
Sep.26-72	Filed deft.MCA Inc. to pltff;s Rule 34 Request	
Sep.26-72	Filed deft. Duchess Music Corp. to pltff's Rule 34 Request.	
Sep.26-72	Filed stip. and order that the period from Sept. 1, 1972 until the entry of final judgment with respect to the claims of CBS in this action against BMI,CBS shall pay BMI in respect to the BMI license granted the CBS Television Network pursuant to the Court's Order and Judgment of Dec. 30, 1970, an interim fee in equal montly installments at the rate of one-million-seven-hundred-thousand dollars ($1,700,000) per annum, not subject to adjustment upward or downward prior to the entry of final judgment herein as to BMI. etc. So Ordered. Lasker,J.	
Sep.28-72	Filed ASCAP'S Memorandum in opposition to CBS' motion to compel answers to interrogs. and production of documents.	
Oct.2-72	Filed deft. Warner Bros. Inc., response to pltff's Rule 34 Request.	
Oct.3-72	Filed response of Screen Gens-Columbia Music,Inc. to pltff.s Rule 34 Request.	
Oct.4-72	Filed deposition of ASCAP,taken by pltff. dated June 2, 1972	
Oct.4-72	Filed " " " " " " " June 8, 1972	
Oct.4-72	Filed " " " " " " " June 9, 1972	
Oct.4-72	Filed " " " " " " " June 13, 1972	
Oct.4-72	Filed " " " " " " " July 6, 1972	
Oct.4-72	Filed " " " " " " " July 7, 1972	
Oct.4-72	Filed " " " " " " " July 14, 1972	
Oct.4-72	Filed " " " " " " " July 17, 1972	
Oct.4-72	Filed " " " " " " " July 18, 1972	
Oct.4-72	Filed " " " " " " " July 21, 1972	
Oct.4-72	Filed " " " " " " " July 24, 1972	
Oct.4-72	Filed " " " " " " " July 26,1972	
Oct.4-72	Filed " " " " " " " July 27,1972	
Oct.4-72	Filed " " " " " " " July 31, 1972	
Oct.4-72	" " " " " " " " Aug.3-72.	
Oct.4-72	" " " " " " " " Aug.9-72.	
Oct.4-72	" " " " " " " " Aug.4-72.	
Oct.4-72	" " " " " " " " Aug.10-72.	
Oct.4-72	" " " " " " " " Aug.16-72.	
Oct.4-72	" " " " " " " " Aug.17-72.	
Oct.4-72	" " " " " " " " Aug.30-72.	
Oct.4-72	" " " " " " " " Aug.31-72.	
Oct.4-72	" " " " " " " " Sep.11-72.	
Oct.18-72	Filed Notice of Motion by Pltf. re: overrule objections (time to be set.)	
Oct.18-72	Filed Pltf's.Memorandum in support of its Rule 37 motion to compel production of Publisher defendant documents.	

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DATE	PROCEEDINGS	Date O Judgme
Oct.24-72	Filed request No.1 of defts ASCAP, etc. For Production of Documents.addressed to pltff.	
Oct.25-72	Filed defts' notice to take deposition of Clive J. Davis,on 11-17-72 an other as indicated.	
Oct.25-72	Filed envelope -Material supplied to be made part of the deposition of Jewel Musicby Eugene Goodman, taken on July 31,1972.	
Nov.3-72	Filed EMI Publisher Defts'.Memorandum in opposition to Pltf's.Rule 37 Motion.	
Nov.3-72	Filed Affidavit of Service of Defts'.Memorandum in opposition.	
Nov.10-72	Filed Judith Grad, Affidavit submitted on behalf of Screen Gens-Columbia Music, Inc. in opposition to pltff's Rule 37 motion to compel document production	
Nov.16-72	Filed defts' April Music,Inc. Blackwood Music,Inc.and Holt,Rinehart and Winston, Inc. Notice of Appearance and Demand	
Nov.17-72	Filed Ray Elbert Parker, d/b/a Philray Publishing Co. Memorandum in oppsoition to pltff's motion and order of court dated 9-13-72.	
Dec.5-72	Filed defts' ASCAP,etc.notice of motion Re; Inspection and copying etc. Return date to be set by court.	
Dec.8-72	Filed Notice of Examination.	
Dec.12-72	Filed MEMO.END. on motion papers filed 12/5/72. Respectfully referred to Magistrate Raby for hearing and recommendation. Lasker, J.	
Jan 10,73	Filed Notice of Dfts. ASCAP to take deposition.	
Jan 26.73	Filed Protective Order. Ordered that Confidential Information,shall mean all information in any form,including but not limited to every writing or magnetic tape & any matter contained therein, Provided by ASCAP, etc.At the conclusion of this action, all confidential information shall be returned to ASCAP'S attys,etc. Consented to:So Ordered Lasker J. (M/N)	
Feb 8.73	Filed Protective Order. Ordered (1) Confidential information shall mean all information in any form, as indicated (See Order) So Ordered Lasker J. (M/N)	
Feb 20.73	Filed Stip & Order that certain dfts. shall produce documents in compliance with paragraph 5 as indicated. So Ordered Lasker J. By pltff.	
Feb 26.73	Filed Protective Order. Ordered that Confidential Information shall mean all information in any form,including but not ltd. to every writing or magnetic tape & any matter contained therein,provided by Stroock & Stroock & Lavan,etc. At the conclusion of this action all confidential information shall be retruned to Stroock & Stroock & Lavan,etc. Consented to. So Ordered Lasker J.	
Feb 26.73	Filed Protective Order. Ordered that Confidential Information shall mean all information in any form,including but not ltd. to every writing or magnetic tape & any matter contained therein, provided by Simpson Thacher & Bartlett, or any of its representives,etc. At the conclusion of this action all confidential information shall be returned to Simpson Thacher Bartlett,etc. So Ordered Lasker J. Consented to.	
Feb 28.73	Filed Notice to take deposition by Pltff. upon Albert Berman.	
Mar.7.73	Filed Notice to take deposition by Columbia Broadcasting System Inc. upon Brian Buda,Altman,Stuller,Weiss Advertising Inc.	
Mar 8.73	Filed Protective Ordered. Ordered that confidential Information shall mean all information in any form including but not ltd. to every writing or magnetic tape & any matter contained therein,provided by Screen Gems,or any of its representives, etc. At the conclusion of this action all confidential information shall be returned to Screen Gems,etc. So Ordered Lasker J. (Consented to)	

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DATE	PROCEEDINGS	Date Orde Judgment I
Mar 8.73	Filed Protective Order. Ordered that Confidential information shall mean all information in any form, including but not ltd. to evey writing or magnetic tape & any matter contained therein, provided by Linden & Deutch, or any of its representives, etc., At the conclusion of this action all confidential information shall be returned to Lindent & Deutch. So Ordered Lasker J. (Consent to)	
Mar 15. 73	Filed Opinion #39316. CBS application is granted. So Ordered Lasker J.	/
Mar 15.73	Filed Satisfactio on recovery against the USA on Judgment of Claimant, Alberta Brown, Indiv. & as Administratrix of the Estate of Bennie Brown, Deceased, Ent. 11/17/72.	
Mar 19.73	Filed ASCAP'S Supplementary Answer to pltffs. Interrog. 26.	
Mar 29-73	Filed Consent Protective Order, OrderedThat "Confidential Information" shall mean all information in any form, including but not limited to every writing or magnetic tape and any matter contained therein as indicated: So Ordered Lasker J.	
Mar 27-73	Filed deft. BMI's answwrs to pltffs Interrogatories 5 & 7(b) and supplementary answers to pltff's Interrogatories, 3, 7, (a) and 26.	
Apr.11-73	Filed Deft. Broadcast Music Inc.'s affidavit of service byHerbert Yellin.	
Apr.17-73	Filed deft. Broadcast Music, Inc.'s affidavit of service by Douglas Craig Bowman.	
Apr.19-73	Filed deft. ASCAP's notice to take deposition of Arnost H. Horlik on 4/26/73.	
May 8-73	Filed pltffs affidavit of service by Herbert F. Yellin	
May 1-73	Trial begun before Lasker J. withput a jury.	
May 2-73	Trial Cont.	
May 3-73	Trial Cont.	
May 7-73	Trial Cont	
May 8-73	Trial Cont	
May 9-73	Trial Cont.	
May 10-73	Trial Cont.	
May 14-73	Trial Cont.	
May 15-73	Trial Cont	
May 16-73	Trial Cont.	
May 17-73	Trial Cont.	
May 23-73	Trial Cont.	
May 29-73	Trial Cont	
May 30-73	Trial Cont.	
May 31-73	Trial Cont.	
Jun 1-73	Filed stip and order that the firm of Hughes, Hubbard, Reed be substituted as counsel for deft. Screen Gems-Columbia Music, Inc. in place of David H. Horowitz, So Ordered Lasker J.	
Aug. 15-73	Filed one envelope containing corrections agreed among counsel for trial proceedings dated May 1, 2 and 3, 1973-	
Nov.19-73	Filed pltf. notice of deposition of Michael Dann.	
Nov.20-73	Pretrial hearing held - Mag. Raby	
Nov.21-73	Filed ASCAP'S designation of additional documents.	
Nov.30-73	Filed transcript of May 1,2,3, 1973.	
Nov.30-73	Filed transcript of May 8,9,10, & 14, 1973.	
Nov.30-73	Filed transcript of May 15,16,17,23, 1973.	
Nov.30-73	Filed transcript of May 24, 29, 30, & 31, 1973.	
Dec.7-73	Filed defts Broadcast Music notice to offer additional exhibits.	
Dec.7-73	Filed affdvt of service by Richard Alberti.	
Nov. 26-73	Before Lasker, J. trial continued from 5-31-73	
Nov. 27-73	Trial continued	
Nov. 28-73	" "	
Nov. 30-73	" "	
Dec. 4-73	" "	
Dec. 5-73	" "	
Dec. 6-73	" "	
Dec. 11-73	" " cont'd on page 15	

DATE	FILINGS—PROCEEDINGS	AMOUNT REPORTED VOLUME RETURNS
Dec. 12-73	Trial continued	
Dec. 13-73	" "	
Dec. 14-73	" " and concluded--Decision reserved.	
Feb. 15-74	Filed protective order on consent---Lasker,J.	
Feb.22-74	Filed Protective order on consent. LASKER,J.	
Mar.14-74	Filed BMI additional list of exhibits.	
Mar.14-74	Filed BMI additional list of exhibits.	
Mar.20-74	Filed deft ASCAP'S designation of additional documents.	
Mar.25-74	Filed Order substituting Bernard Korman as one of Attys. for ASCAP, in place of Herman Finkelstein. LASKER,J.	
Apr.9-74	Filed pltffs post-trial brief.	
Apr.9-74	Filed pltffs proposed findings of fact & conclusions of law.	
Apr.30-74	Filed Protective order on consent. LASKER,J.	
May 14-74	Filed affdvt. of Robert Baker; Re contracts.	
Jun.10-74	Filed deft (ASCAP)'s proposed findings of fact & conclusions of law.	
Jun 11-74	FiledAffavit of Deft Broadcast Musin INc. designating contract provisions.	
Jun 6-74	Filed Pltff's Designation of Add'l documents No.5.	
Jun 5-74	Filed Transcript ofProceedings dated Mar 21,1974.	
JUN 27-74	Filed transcript of record of proceedings, dated 2-12-74, 3-5-74, 3-14-74, 4-24-74, 5-6-74, 5-16-74, 5-17-74.	
JAN 15 74	Filed transcript of record of proceedings, dated NOV 26, 27, 28, 29, 30, 1973	
JAN 15 74	Filed transcript of record of proceedings, dated DEC 3, 4, 5, 6, 11, 1973.	
JAN 15 74	Filed transcript of record of proceedings, dated Dec 12, 13, 14, 1973.	
Jul 26-74	Filed Pltff's Post - Trial reply brief.	
Aug 7-74	Filed Deft. BMI's Post-Trial Brief.	
Sep 17-74	Filed ASCAP'S Post - Trial rebuttal Brief.	
9-22-75	Filed Opinion & Order.....The foregoing constitutes our findings of fact and conclusions of law. The Complt. is dismissed. It is so Ordered.....Lasker,J. mn	✓
10-21-75	Filed Pltff's Notice of Appeal to USCA from order ent 9-22-75 dismissing action.....Mailed Copies 10-22-75 upon: Paul, Weiss, Rifkind, Wharton & Garrison; Bernard Korman,Esq; Hughes Hubbard & Reed; Storoock & Stroock & Lavan; ~~Simpson, Thacher & Bartlett;~~ Linden & Deutsch; Hofheimer, Gartlir, Gottlieb & Cross,	
4-4-75	Filed Consent Protective Order.....Lasker,J.	
11-11-75	Filed STip &Order for time for NBC to answer interrogs..of ASCAP..Lasker,J.	

DATE	FILINGS—PROCEEDINGS JA 16	AMOUNT REPORTED IN EMOLUMENT RETURNS
12-01-75	Filed Notice of Certification of the Record to the USCA.	
12-02-75	Filed Deft. Broadcast Music Inc, et al. Notice of Motion for an order for entry of final judgment & for retroactive adjustment of interim fees. Ret. 12-11-75	
12-02-75	Filed Defts. Broadcast Music Inc. et al Memorandum of Law.	
12-4-75	Filed stipulation listing documents to filed in lieu of the missing documents.	
12-4-75	Filed Stipulation & order that certain documents be filed & transmitted t	
12-4-75	Filed letter for attys for BMI to Judge Lasker dated 7-15-70.	La
12-4-75	Filed BMI memo (undated) in support of proposed order granting preliminary injunction.	
12-4-75	Filed CBS memo dated 12-8-70, in support of its proposed order & judgment and in opposition to the order proposed byBMI.	
12-4-75	Filed BMI reply memo dated 12-10-70 regarding proposed orders.	
12-4-75	Filed CBS supplemental memo dated 12-16-70 regarding the question of including a discrimination provision in the preliminary injunction order.	
12-4-75	Filed BMI supplemental memo (undated) regarding proposed orders.	
12-4-75	Filed BMI memo dated 3-12-71 regarding plaintiff's motion for class action determination.	
12-4-75	Filed reply memo dated 9-3-71, in support of summary judgment motion.	
12-4-75	Filed ASCA: Notice of Motion dated 10-18-71, & affdvt of Jay H. Topkis regarding discovery.	
12-4-75	Filed ASCAP memo dated 11-10-71 in reply to CBS supplemental memo.	
12-4-75	Filed ASCAP memo dated 2-15-72, regarding how it thinks this case should proceed.	
12-4-75	Filed BMI memo dated 2-22-72, regarding issues to be tried.	
12-4-75	Filed CBS memo dated 3-3-72, in reply to ASCAP memo dated 2-15-72.	
12-4-75	Filed Letter from Judge Lasker to all counsel dated 3-9-72.	
12-4-75	Filed CBS memo (undated) regarding the nature of the per-use license its purposes.	
12-4-75	Filed ASCAP memo dated 3-24-72 regarding an outline of proof.	
12-4-75	Filed letter from attys for CBS to Judge Lasker dated 3-27-72.	
12-4-75	Filed Letter from Judge Lasker to Alan J. Hruska copies to all counsel, dated 3-28-72.	
12-4-75	Filed CBS memo dated 4-11-72, with respect to ASCAP'S proposed economic p	
12-4-75	Filed memo dated 5-5-72, regarding proposed order on Rule 42 (b) motion.	
12-4-75	Filed Letter from attys for ASCAP to Judge Lasker dated 6-5-72.	
12-4-75	Filed Letter from attys for ASCAP to Judge Lasker dated 6-20-72.	
12-4-75	Filed Letters (2) from attys for BMI to Judge Lasker dated 6-20-72.	

Continue on page 17.

DATE	FILINGS—PROCEEDINGS JA 17
12-4-75	Filed Letter from attys for CBS to Judge Lasker dated 6-20-72.
12-4-75	Filed Letter from attys for ASCAP to Judge Lasker dated 6-26-72
12-4-75	Filed Letter from attys for BMI to Judge Lasker dated 7-20-72
12-4-75	Filed Letter from attys for CBS to Judge Lasker dated 7-21-72.
12-4-75	Filed Letter from attys for ASCAP to Judge Lasker dated 7-26-72.
12-4-75	Filed CBS notice of motion dated 8-25-72, and affdvt of A. J. Hruska.
12-4-75	Filed CBS memo dated 8-25-72, in support of its Rule 37 Motion.
12-4-75	Filed affdvt of Jay H. Topkis in opposition to motion for protective order.
12-4-75	Filed Letter from attys for ASCAP to Judge Lasker dated 9-22-72.
12-4-75	Filed CBS memo dated 9-29-72, in opposition to ASCAP'S motion for a protective order.
12-4-75	Filed CBS memo dated 11-9-72, in reply to memo of BMI publishers.
12-4-75	Filed Report of U.S. Mag. Raby dated 11-29-72.
12-4-75	Filed Letter from J. Lasker to all counsel dated 12-15-72.
12-4-75	Filed ASCAP memo dated 1-3-73, regarding offer of proof.
12-4-75	Filed memo dated 1-16-73, regarding ASCAP'S offer of proof.
12-4-75	Filed Report of U.S. Mag. Raby dated 2-1-73.
12-4-75	Filed ASCAP memo dated 4-25-73.
12-4-75	Filed BMI trial memo dated 4-25-73.
12-4-75	Filed CBS trial memo dated 4-25-73.
12-4-75	Filed ASCAP reply memo dated 5-7-73
12-4-75	Filed CBS reply memo dated 5-7-73
12-4-75	Filed ASCAP memo dated 5-24-73, on CBS' latest statement of the elements of a per-use license.
12-4-75	Filed Letter from attys for BMI to Judge Lasker dated 7-24-73.
12-4-75	Filed Letter from atty for CBS to Judge Lasker dated 11-6-73.
12-4-75	Filed Letter from attys for ASCAP to Judge Lasker dated 11-12-73.
12-4-75	Filed Letter form attys for CBS to Judge Lasker dated 11-13-73
12-4-75	Filed Letter from Judge Lasker to counsel dated 11-14-73.
12-4-75	Filed Report of U. S. Mag. Raby dated 11-20-73.
12-4-75	Filed BMI Post-Trial Brief dated June 3, 1974.
12-4-75	Filed ASCAP Post-Trial Brief dated 6-3-74.
12-9-75	Filed Notice of Certification of Supplemental Record to the USCA.
12-29-75	Filed Pltffs. affidavit and notice of Cross Motion for an order staying durng pendency of pltffs.appeal. Ret. Sine Die
	(Continued)

DATE	FILINGS—PROCEEDINGS JA 18	AMOUNT REPORTED IN EMOLUMENT RETURNS
12-29-75	Filed CBS's Memorandum in opposition to BMI's Motion pursuant to rule 54(b) & in support of CBS's Cross motion pursuant to rule 62(h)	
12-29-75	Filed Affidavit of Service by Mail by John Murphy on 12-24-75.	
1-5-76	Filed Affidavit by Mario A. Rosado of Service on 1-5-76.	
1-5-76	Filed Reply Affidavit by Edward M. Cramer in support of BMI's motion for entry of judgment pursuant to FRCP 54(b) etc.	
1-5-76	Filed Reply Memorandum in support of BMI Motion for entry of a Rule 54(b) Certificate & in opposition to CBS Cross Motion for a Stay pending Appeal.	
1-5-76	Filed Affidavit in support of motion to compel production of documents by A. Vernon Carnahan.	
1-29-76	Filed Memo. End. on motion dtd.12-2-75 BMI's motion for a Rule 54(b) denied, on the conditions specified. Lasker J. (mailed notice)	

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

JA 19

COLUMBIA BROADCASTING SYSTEM, INC., Plaintiff, -against- AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, STANLEY ADAMS, as President of American Society of Composers, Authors and Publishers, HAROLD ARLEN, SAMUEL BARBER, CARL FISCHER, INC., CHAPPELL & CO., INC., CY COLEMAN, EDWIN H. MORRIS & CO., INC., ELKAN-VOGEL, INC., ESSEX MUSIC, INC., FAMOUS MUSIC CORP., G. SCHIRMER, INC., MORTON GOULD, ARTHUR HAMILTON, HENRY N. MANCINI, MCA, INC., PETER MENNIN, MILENE MUSIC, INC., ROBBINS MUSIC CORPORATION, RICHARD RODGERS, ARTHUR SCHWARTZ, SHAPIRO, BERNSTEIN & CO., INC., WARNER BROTHERS-7 ARTS INC., NED WASHINGTON, on behalf of themselves and all other members of American Society of Composers, Authors and Publishers, BROADCAST MUSIC INC., AL GALLICO MUSIC CORP., PAUL ANKA, ASSOCIATED MUSIC PUBLISHERS, INC., JERRY BOCK, DUCHESS MUSIC CORP., FRED EBB, EDWARD B. MARKS MUSIC CORP., NORMAN GIMBEL, SHELDON HARNICK, HILL AND RANGE SONGS, INC., HOLLIS MUSIC, INC., JOHN KANDER, CHARLES KOPPELMAN, MACLEN MUSIC, INC., PEER INTERNATIONAL CORPORATION, DON RUBIN, SCREEN GEMS-COLUMBIA MUSIC, INC., JOSEPH STEIN, SUNBEAM MUSIC, INC., UNART MUSIC CORP., on behalf of themselves and all others who have granted Broadcast Music Inc. the right to license to third parties nondramatic performing rights of their copyrighted music, Defendants.	Civil Action No. COMPLAINT

Plaintiff, for its complaint, avers:

1. This is an action (a) pursuant to Section 16 of the Clayton Act (15 U.S.C. § 26) for an injunction against

defendants' violations of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2), and (b) pursuant to the Delcaratory Judgment Act (28 U.S.C. §§ 2201 and 2202) for a declaration that defendants are misusing their copyrights on musical compositions. The action thus arises under the antitrust laws (15 U.S.C. §§ 1 et seq.) and the Copyright Law (17 U.S.C. §§ 1 et seq.) of the United States, as hereinafter more fully appears. The matter in controversy exceeds the value of $10,000, exclusive of interest and costs. Jurisdiction is based on 15 U.S.C. § 26, and 28 U.S.C. §§ 1331 (a), 1337 and 1338(a).

2. Plaintiff is a New York corporation with its principal office at 51 West 52 Street, New York, New York. It is engaged in the business, among others, of operating a nationwide television network and, in that connection, supplies network television programs, pursuant to affiliation agreements, to approximately 200 independently owned television stations throughout the country.

3. Defendants' acts, as hereinafter set forth, affect interstate commerce in the licensing of the nondramatic performing rights of copyrighted musical compositions, the distribution of television network programs and the sale of broadcast time.

4. Defendant American Society of Composers, Authors and Publishers ("ASCAP") is an unincorporated association organized under the laws of the State of New York with its principal office at 575 Madison Avenue, New York, New York. Defendant Stanley Adams is President of ASCAP. On information and belief, (a) ASCAP's members include more than 14,000 corporations and individuals who have granted to ASCAP the right to license to others the nondramatic performing

rights of their copyrighted music; and (b) ASCAP and its members have thus combined to form a pool of copyrights on more than one million musical compositions (the "ASCAP pool").

5. Defendant Broadcast Music Inc. ("BMI") is a New York corporation with its principal office at 589 Fifth Avenue, New York, New York. On information and belief, (a) it has entered into agreements with more than 30,000 corporations and individuals ("BMI members") which grant to BMI the right to license to others the nondramatic performing rights of such members' copyrighted music; and (b) BMI and its members have thus combined to form a pool of copyrights on more than 250,000 musical compositions (the "BMI pool").

6. On information and belief, (a) defendants Harold Arlen, Samuel Barber, Cy Coleman, Morton Gould, Arthur Hamilton, Henry N. Mancini, Peter Mennin, Richard Rodgers, Arthur Schwartz and Ned Washington are ASCAP members and reside or are found in the Southern District or another district within the State of New York; (b) defendants Chappell & Co., Inc., Essex Music, Inc., Famous Music Corp., Carl Fischer, Inc., MCA, Inc., Edwin H. Morris & Co., Inc., Robbins Music Corp., Shapiro, Bernstein & Co., Inc., G. Schirmer, Inc. and Warner Brothers-7 Arts Inc. are ASCAP members and have their principal offices in the Southern District or another district within the State of New York; (c) defendants Elkan-Vogel, Inc. and Milene Music, Inc. are ASCAP members and are doing business in the Southern District of New York; and (d) all defendants named in this paragraph are members of the ASCAP Board of Directors or are represented on that Board by their officers, directors of other agents.

7. On information and belief, (a) defendants Paul Anka, Jerry Bock, Fred Ebb, Norman Gimbel, Sheldon Harnick,

John Kander, Charles Koppelman, Don Rubin and Joseph Stein are BMI members and reside or are found in the Southern District or another district within the State of New York; and (b) defendants Associated Music Publishers, Inc., Duchess Music Corp., Al Gallico Music Corp., Hill and Range Songs, Inc., Hollis Music, Inc., Maclen Music, Inc., Edward B. Marks Music Corp., Peer International Corporation, Screen Gems-Columbia Music, Inc., Sunbeam Music, Inc. and Unart Music Corp. are BMI members and have their principal offices in the Southern District or another district within the State of New York.

8. ASCAP members constitute a class; BMI members constitute a class. Each such class is so numerous that joinder of all its members would be impracticable. The rights sought to be enforced by this action embrace questions of law and fact common to each class. The defenses of the representative parties will be typical of the defenses of each class, and the representative parties will fairly and adequately protect the interests of each class. Additionally, the prosecution of separate actions against individual members of each class would create a risk of inconsistent or varying adjudications with respect to individual members of each class which would establish incompatible standards of conduct for plaintiff, and plaintiff has acted on grounds generally applicable to the class, thereby making appropriate final injunctive relief and corresponding declaratory relief with respect to the class as a whole.

9. The aforesaid agreements and combinations among ASCAP members and ASCAP and among BMI members and BMI constitute (a) restraints of interstate trade in the licensing of nondramatic performing rights of musical com-

positions, which are unlawful under Section 1 of the Sherman Act; and (b) monopolizations of the nondramatic performing rights of the copyrighted music in the ASCAP and BMI pools, which are unlawful under Section 2 of the Sherman Act.

10. In 1941, the United States Department of Justice commenced an action against ASCAP and its members as a class, entitled United States v. American Society of Composers, Authors and Publishers, Civ. No. 13-95, charging them with antitrust violations based upon their formation and use of the ASCAP pool in certain areas of interstate trade, including radio broadcasting. The action was resolved by the entry of a consent decree against ASCAP, filed March 4, 1941. Among other things, the 1941 consent decree enjoined ASCAP from refusing to grant so-called "per-program" licenses to radio broadcasters and permitted ASCAP to grant so-called "blanket" licenses only "if desired by such broadcaster[s]". Both forms of license compel a broadcaster to pay for the right to use all copyrighted music in the ASCAP pool, even though it might want rights only as to some of those musical compositions. Under a "blanket" license, the broadcaster must pay ASCAP a percentage of its total "time charges" (i.e., revenues received from advertisers for the use of broadcasting facilities), irrespective of the extent to which or the manner in which ASCAP music is actually used on those facilities. Under a "per-program" license, the broadcaster must pay ASCAP, at ASCAP's option, either a higher percentage of the time charges attributable to those programs using ASCAP music, or a flat fee for each such program, irrespective of the amount of use of ASCAP music on such programs

or the nature of such use. Also by operation of the decree, a license extended to a radio network confers upon the network's affiliated stations the right simultaneously to broadcast performances of ASCAP music on network programs.

11. The 1941 decree was superseded by the Amended Final Judgment filed in this Court on March 14, 1950. The 1950 decree continued in force essentially the same provisions with respect to ASCAP offers of "blanket" and "per-program" licenses but applied them to television as well as to radio broadcasters and directed ASCAP to use "its best efforts" to give prospective licensees a "genuine choice" between the two forms of license. Additionally, the 1950 decree provided in effect that any person applying to ASCAP for a license to use any, some or all of the musical compositions in the ASCAP pool thereby obtained the right to use such musical compositions at a fee which, in the event of disagreement between the parties, would be fixed by the Court.

12. BMI is also subject to a consent decree arising out of a Government antitrust action. Such decree, filed in this Court on November 29, 1966, in United States v. Broadcast Music, Inc. and RKO General, Inc., Civ. No. 3787, superseded a decree filed in 1941 in the United States District Court for the Eastern District of Wisconsin. The 1966 decree directs BMI to offer licenses to broadcasters for the performance of music in its pool on, at its option, either a "per-program" or a "per-programming-period" (i.e., a 15-minute period commencing on the hour or each subsequent quarter hour) basis.

13. Neither ASCAP nor BMI is required under its

respective decree to grant licenses providing for royalty payments measured by the actual use of copyrighted music (hereinafter referred to as "per-use" licenses).

14. For many years, plaintiff has been furnishing to its affiliated stations network programs containing performances of copyrighted music in the ASCAP and BMI pools. For that purpose, plaintiff has received "blanket" licenses from ASCAP and BMI (hereinafter sometimes referred to collectively as the "licensing societies"), enabling it to use all such music in return for paying each licensing society a percentage of its total time charges or certain fixed sums, irrespective of the extent to which or manner in which it used ASCAP or BMI music. As a result, plaintiff has paid royalties on television network programming which did not use any music at all and has paid the same royalties for a program that used a few seconds of one ASCAP or BMI musical composition as for a program that used many minutes of numerous ASCAP or BMI compositions. The licenses now in existence between plaintiff and each licensing society with respect to plaintiff's television network programs expire December 31, 1969.

15. It is essential to plaintiff, in order to enable it to compete with other television networks, that it have the rights to use many, if not all, musical compositions in the ASCAP and BMI pools. Any attempt by plaintiff to acquire such a large body of rights from the individual members of ASCAP and BMI would be wholly impracticable in the light of the facts that each licensing society has thousands of members owning copyrights to hundreds of thousands of musical compositions, that, in many cases, multiple parties,

including individuals, companies, trusts or estates, own interests in, or have claims with respect to, performing rights of single copyrights and that such members and parties are scattered throughout the world.

16. On December 19, 1969, plaintiff delivered to ASCAP and BMI a letter (copy of which is annexed hereto as Exhibit A), requesting that each licensing society promptly submit to plaintiff the terms upon which it would be willing to grant a new performing rights license which would provide, effective January 1, 1970, for payments measured by the actual use of its music by plaintiff's television network. Plaintiff also advised the licensing societies in that letter that it was prepared to consider a rate structure reflecting the relative values of different uses of music.

17. By letter dated December 23, 1969 (copy of which is annexed hereto as Exhibit B), BMI rejected plaintiff's request, and in that letter, as well as in telegrams previously sent by BMI to plaintiff's affiliated television stations, threatened to sue plaintiff and those stations for infringement of copyrights, unless, prior to January 1, 1970, plaintiff agree to accept for its network programs one of the forms of license which BMI is required to grant by its 1966 decree, neither of which constitutes a "per-use" license.

18. By letter dated December 23, 1969 (copy of which is annexed hereto as Exhibit C), ASCAP also rejected plaintiff's request. The ASCAP letter treats plaintiff's request as an application for a form of license which ASCAP is required to give applicants under the 1950 consent decree and states that plaintiff has thereby obtained such a

license, effective January 1, 1970. Plaintiff's December 19, 1969, letter, however, constitutes no such application, but rather a request for a "per-use" license which the 1950 ASCAP decree does not even mention, let alone compel ASCAP to grant. Additionally, ASCAP's letter indicates an intention to delay any substantive response to plaintiff's request until some time after it has brought the request "to the attention of the Society's Board of Directors at its next meeting to be held on January 29". ASCAP has therefore deferred, for at least one month beyond the expiration of the existing license, quoting any license terms to plaintiff or even entering into any negotiations with plaintiff regarding such terms. In view of the fact that plaintiff and ASCAP negotiated during a period of approximately eight years before agreeing on the provisions of the present "blanket" license (which expires on the date of this complaint), it is likely that a further substantial period of time would be required for the parties to negotiate any future license terms. For that substantial interim period, ASCAP insists in its letter that plaintiff, in order to obtain the right to use copyrighted music in the ASCAP pool on its television network programs, accept the type of "blanket" or "per-program" license which ASCAP is required to grant by the 1950 decree.

19. Thus, each licensing society has conditioned the grant of a performing rights license to copyrighted music in its pool upon the payment by plaintiff of royalties measured by total time charges for programs in which none of that society's copyrighted music (or, indeed, no music or the copyrighted music of another licensor) is used, and upon

the payment of the same royalties for a program using only a single copyrighted musical composition as for a program using many such compositions. Each licensing society is therefore using the leverage inherent in its copyright pool to insist that plaintiff pay royalties on a basis which does not bear any relationship to the amount of music performed. Such insistence by ASCAP and BMI constitutes misuse by each of them of the copyrights in their pools.

20. By virtue of the aforesaid combinations and membership agreements, ASCAP and BMI members have not only created copyright pools in violation of Sections 1 and 2 of the Sherman Act but have also delegated to each of their respective licensing societies the right to condition the grant of licenses on any terms it sees fit to offer and have charged it with the responsibility to protect them against infringements of copyrights in its pool by commencing actions to enjoin, and recovering damages for, any such infringement. Such members have authorized the aforesaid copyright misuse and threats of infringement litigation by their licensing societies.

21. Defendants' refusals to grant performing rights licenses to plaintiff on terms other than those which misuse the copyrights in their pools and their threats to commence infringement actions against plaintiff and its affiliates unless plaintiff agrees before January 1, 1970, to those terms constitute defendants' use of the power of their aforesaid unlawful combinations and monopolizations to injure plaintiff in its business and property.

22. Necessarily, in order to avoid exposure to such massive infringement litigation while attempting to

protect its rights under the antitrust and copyright laws, plaintiff, immediately upon the filing of this complaint, will apply to ASCAP and BMI, under protest and without prejudice to the claims asserted herein, for the rights, pursuant to the 1950 and 1966 decrees, respectively, to perform copyrighted music in their pools during the pendency of this action.

23. Plaintiff has no adequate means to protect itself against defendants' aforesaid antitrust violations and misuse of copyrights other than by making such applications and seeking the injunctive and declaratory relief prayed for herein.

WHEREFORE, plaintiff demands judgment:

A. Directing ASCAP and BMI, permanently and during the pendency of this action, to grant plaintiff licenses for its television network programs, effective as of January 1, 1970, to perform copyrighted music in their respective pools on payment of reasonable royalties measured by actual use of such music on those programs;

B. Enjoining defendants, permanently and during the pendency of this action, from suing or threatening to sue plaintiff or its affiliates, or both, for infringement of copyrights of musical compositions in the ASCAP or BMI pool;

C. Declaring that defendants have misused, as against plaintiff, the copyrights of musical compositions in the ASCAP and BMI pools;

D. Declaring that such copyrights are unenforceable against plaintiff;

E. Awarding to plaintiff its taxable costs, disbursements and reasonable attorneys' fees; and

F. Granting to plaintiff such other, further and different relief as to the Court may seem just and proper.

December 31, 1969.

CRAVATH, SWAINE & MOORE,

by _____

A member of the firm

Attorneys for Plaintiff,
One Chase Manhattan Plaza,
New York, N. Y. 10005
(HAnover 2-3000)

RICHARD G. GREEN,

Of Counsel.

Exhibit A

CBS
TELEVISION
NETWORK

A Division of Columbia Broadcasting System, Inc.
51 West 52 Street
New York, New York 10019
(212) 765-4321

Robert D. Wood, President

Gentlemen:

The music performing rights licenses now offered by each of your organizations to the CBS Television Network are due to expire December 31, 1969. We believe that the current licenses are unfair to CBS because they obligate us to pay for music we do not use, and that it would be illegal for you to continue to impose their provisions upon us against our wishes.

Those licenses now, as they have for many years, compel CBS to pay a percentage of its time charges to CBS advertisers irrespective of the extent to which CBS uses ASCAP and BMI music. The effect is that the royalties paid by CBS do not bear any relationship to the amount of music performed on the CBS Television Network, and that CBS is forced to pay royalties on programming which does not use any music at all. For example, CBS is obligated to pay a share of the revenues earned by those Walter Cronkite news broadcasts which use no music whatever. CBS is also required to pay the same percentage of time charges for a program that uses 10 seconds of one ASCAP or BMI musical composition as for a program that uses 30 minutes of 15 ASCAP or BMI compositions.

We feel strongly that these arrangements are unfair because the amounts that CBS is forced to pay are not measured by its use of the copyrights under which it is licensed. The Supreme Court, in its recent decision in Zenith v. Hazeltine, has unqualifiedly held that a licensee "may insist upon paying only for use" of patents and may not be required to pay upon the basis of total sales, including products in which he may not use any of the licensed patents. The same principle is equally applicable to copyrights; CBS cannot be required to pay royalties measured by total time charges for programs in which no ASCAP or BMI music (or, indeed, no music) is played or to pay the same royalties for a program using only a single ASCAP or BMI composition as for a

program using many compositions. That case supports our conclusion that it is not only unfair but unlawful for you to refuse to grant a license under which the amounts to be paid are based upon the actual use of copyrighted music licensed.

We recognize that your music is essential to the CBS Television Network and do not, of course, propose to stop using it. We merely believe that we should pay for the music -- and pay fairly for it -- when we do use it.

We therefore ask that each of you promptly submit to us the terms upon which you would be willing to grant a new performing rights license which will provide, effective January 1, 1970, for payments measured by the actual use of your music by the CBS Television Network. We are quite prepared to consider a rate structure reflecting the relative values of different uses of music. For example, you might wish to offer per-minute rates, based on the time of day during which the music is performed (and thus on the size and character of the potential audience), and also on the different uses to which the music is put -- feature performances, background performances, and performances in commercial announcements.

We are making the same request to each of you because we hope to pay equitable rates for all of our uses of music, whether the music is licensed by ASCAP, by BMI, or by anyone else.

Very truly yours,

Robert D. Wood

American Society of Composers,
Authors & Publishers
575 Madison Avenue
New York, New York 10022

Broadcast Music, Inc.
589 Fifth Avenue
New York, New York 10020

December 19, 1969

Exhibit B

JA 33

BMI
Broadcast Music Inc. 589 Fifth Avenue, New York, N. Y. 10017 212-759-4500

December 23, 1969

EDWARD M. CRAMER
PRESIDENT

Mr. Robert D. Wood, President
CBS Television Network
A Division of
Columbia Broadcasting System, Inc.
51 West 52nd Street
New York, New York 10019

Dear Mr. Wood:

I have your letter of December 19, 1969 which I received on December 22, 1969. I will not comment on your characterization of our existing licensing arrangement except to point out that:

1. The agreements between BMI and CBS have always been consistent with the Consent Decree entered into between BMI and the United States government.

2. At no time has CBS ever objected to the existing form of license nor did it initiate any discussions relating to a revision of the license.

3. At all times, CBS had the right, as did BMI, to terminate the agreement. By not terminating, it obviously indicated its satisfaction with the license.

4. It was BMI, not CBS, that terminated the license because BMI objected to the unfair and inequitable manner in which CBS was paying for performing rights.

Nevertheless, we continue to be prepared to enter into negotiations with you, looking forward to a new license. As you know, the BMI Consent Decree provides for several alternate licenses and we are ready to explore any of these with you. In fact, since April, we have attempted to enter into meaningful negotiations looking forward to a new license.

You must recognize the fact that after January 1, 1970, the BMI repertory will not be available to you if CBS is unlicensed. Any

performances occurring thereafter are deliberate and willful copyright infringements under Sections 101 and 104 of 17 U.S.C. In view of the limited time left, I suggest you call me immediately so that we can arrange a meeting with a view to resolving this matter.

Very truly yours,

Edward M. Cohen

EMC:hs

CODE 212 586-8600

JA 35

CABLE ADDRESS: ASCAP, NEW YORK

Exhibit C

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS
575 MADISON AVENUE
NEW YORK, N.Y. 10022

ERMAN FINKELSTEIN
GENERAL COUNSEL

December 23, 1969

Mr. Robert D. Wood, President
CBS Television Network
51 West 52d Street
New York, N. Y. 10019

Dear Mr. Wood:

Your letter of Friday, December 19, has been referred to me by Mr. Stanley Adams, President of the Society, who will bring it to the attention of the Society's Board of Directors at its next meeting to be held on January 29.

In the meantime, the CBS Television Network has the right to use the compositions in the ASCAP repertory under Section IX(A) of the ASCAP Consent Decree, a copy of which is enclosed. Your Counsel is familiar with this provision.

When we were in Court last Thursday, December 18, we discussed the subject of a license agreement for the CBS Television Network for the period commencing January 1, 1970, but your Counsel indicated that he was not yet ready to pursue the subject. At that time we offered a sixty-day extension of the license to use ASCAP music, during which period we could negotiate a new agreement or submit the matter to the Court. Your Counsel was not prepared to comment on that offer at that time.

We hereby confirm that your letter of December 19 constitutes an application for a license under Section IX and that you have a license for a sixty-day period commencing January 1, 1970, at rates and terms to be negotiated, or determined ultimately by the Court.

We are scheduled to meet with your Counsel in Court on January 12, and we may be able to pursue this matter further at that time.

Very truly yours,

Herman Finkelstein

HF:H
enc.
cc: Mr. Stanley Adams

RECEIVED
DEC 29 1969
ROBERT D. WOOD

Section IX of

Amended Consent Judgment

American Society of
Composers, Authors and Publishers

Civil Action No. 13-95 Entered March 14, 1950

IX. (A) Defendant ASCAP shall, upon receipt of a written application for a license for the right of public performance of any, some or all of the compositions in the ASCAP repertory, advise the applicant in writing of the fee which it deems reasonable for the license requested. If the parties are unable to agree upon a reasonable fee within sixty (60) days from the date when such application is received by ASCAP, the applicant therefor may forthwith apply to this Court for the determination of a reasonable fee and ASCAP shall, upon receipt of notice of the filing of such application, promptly give notice thereof to the Attorney General. In any such proceeding the burden of proof shall be on ASCAP to establish the reasonableness of the fee requested by it. Pending the completion of any such negotiations or proceedings, the applicant shall have the right to use any, some or all of the compositions in the ASCAP repertory to which its application pertains, without payment of any fee or other compensation, but subject to the provisions of Subsection (J) hereof, and to the final order or judgment entered by this Court in such proceeding;

(B) When an applicant has the right to perform any compositions in the ASCAP repertory pending the completion of any negotiations or proceedings provided for in Subsection (A) hereof, either the applicant or ASCAP may apply to this Court to fix an interim fee pending final determination of what constitutes a reasonable fee. If the Court fixes such interim fee, ASCAP shall then issue and the applicant shall accept a license providing for the payment of a fee at such interim rate from the date of the filing of such application for an interim fee. If the applicant fails to accept such license or fails to pay the interim fee in accordance therewith, such failure shall be ground for the dismissal of his application. Where an interim license has been issued pursuant of this Subsection (B), the reasonable fee finally determined by this Court shall be retroactive to the date the applicant acquired the right to use any, some or all of the compositions in the ASCAP repertory pursuant to the provisions of this Section IX;

(C) When a reasonable fee has been finally determined by this Court, defendant ASCAP shall be required to offer a license at a comparable fee to all other applicants similarly situated who shall thereafter request a license of ASCAP, but any license agreement which has been executed without any Court intervention between ASCAP and another user similarly situated prior to such determination by the Court shall not be deemed to be in any way affected or altered by such determination for the term of such license agreement;

(D) Nothing in this Section IX shall prevent any applicant or licensee from attacking in the aforesaid proceedings or in any other controversy the validity of the copyright of any of the compositions in the ASCAP repertory nor shall this Judgment be construed as importing any validity or value to any of said copyrights.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

COLUMBIA BROADCASTING SYSTEM, INC., Plaintiff, -against- AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al., Defendants.	69 Civ. 5740 5/28/70
AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, STANLEY ADAMS, as President of American Society of Composers, Authors and Publishers, HAROLD ARLEN, SAMUEL BARBER, CARL FISCHER, INC., CHAPPELL & CO., INC., EDWIN H. MORRIS & CO., INC., ELKAN-VOGEL, INC., ESSEX MUSIC, INC., FAMOUS MUSIC CORP., HENRY N. MANCINI, PETER MENNIN, MILENE MUSIC, INC., ROBBINS MUSIC CORPORATION, RICHARD RODGERS, SHAPIRO, BERNSTEIN & CO., INC., Defendants-Counterclaimants, -against- COLUMBIA BROADCASTING SYSTEM, INC., Plaintiff-Counterdefendant, NATIONAL BROADCASTING COMPANY, INC., Counterdefendant.	ANSWER AND COUNTERCLAIMS OF ASCAP AND CERTAIN ASCAP MEMBERS

Defendants American Society of Composers, Authors and Publishers ("ASCAP"), Stanley Adams (sued herein as President of ASCAP), Harold Arlen, Samuel Barber, Carl Fischer, Inc., Chappell & Co., Inc., Edwin H. Morris & Co., Inc., Elkan-Vogel, Inc., Essex Music, Inc., Famous Music Corp., Henry N. Mancini, Peter Mennin, Milene Music, Inc., Robbins Music Corporation, Richard Rodgers, and Shapiro, Bernstein & Co., Inc., by their attorneys Sullivan & Cromwell

and Herman Finkelstein, for their answer to the complaint and for their counterclaims against plaintiff and counter-defendant National Broadcasting Company, Inc. ("NBC"):

1. Deny each and every allegation contained in paragraph 1 of the complaint, except admit that plaintiff purports to base the action on the statutes cited in said paragraph, and the matter in controversy exceeds the value of $10,000 exclusive of interest and costs.

2. Admit that plaintiff is a New York corporation with its principal office at 51 West 52nd Street, New York, New York, that it is engaged in the business, among others, of operating a nationwide television network and that, in that connection, it supplies network television programs to approximately 200 television stations throughout the country with which it has affiliation agreements; aver that the television stations to which plaintiff supplies network television programs include five television stations wholly owned and operated by it; and except as so admitted and averred, deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 2 of the complaint.

3. Deny each and every allegation contained in paragraph 3 of the complaint which refers or is intended to refer to them or to other ASCAP members.

4. Admit the second sentence of paragraph 4 of the complaint, and deny each and every allegation contained in the first and third sentences of said paragraph, except admit that defendant ASCAP is an unincorporated association with its principal office at 575 Madison Avenue, New York, New York, and that the approximately 16,000 members of

defendant ASCAP grant it the non-exclusive right to license, for limited periods of time, the non-dramatic public performance for profit of copyrighted musical compositions written, composed, published or copyrighted by them.

5. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 5 of the complaint, except admit on information and belief that defendant Broadcast Music,Inc. ("BMI") is a New York corporation with its principal office at 589 Fifth Avenue, New York, New York, engaged in the business, among other things, of acquiring from copyright owners and others the exclusive rights to license the non-dramatic public performance for profit of copyrighted musical compositions, and granting to users non-exclusive licenses for such performances.

6. Admit the allegations contained in (a) and (b) of paragraph 6 of the complaint which refer or are intended to refer to them, except deny that defendant Mancini resides or is found in the Southern District or another district within the State of New York; admit that each other individual and corporation named in (a) and (b) is a member of ASCAP, and deny knowledge or information sufficient to form a belief as to the truth of the other allegations in (a) and (b) concerning said persons; deny each and every allegation contained in (c) of said paragraph except admit that defendants Elkan-Vogel, Inc. and Milene Music, Inc. are members of ASCAP; deny each and every allegation contained in (d) of said paragraph except admit that defendants Arlen, Barber, Coleman, Gould, Hamilton, Mancini, Mennin, Rodgers, Schwartz and Washington are writer members on the ASCAP board and defendants Chappell & Co., Inc., Carl Fischer, Inc., MCA, Inc., Edwin H.

Morris & Co., Inc., Shapiro, Bernstein & Co., Inc., G. Schirmer, Inc., Warner Brothers Inc. (sued herein as Warner Brothers-7 Arts Inc.), Elkan-Vogel, Inc. and Milene Music, Inc. are publisher members of ASCAP represented on its board.

7. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 7 of the complaint.

8. Deny each and every allegation contained in paragraph 8 of the complaint.

9. Deny each and every allegation contained in paragraph 9 of the complaint which refers or is intended to refer to them or other ASCAP members, and deny knowledge or information sufficient to form a belief as to the truth of the allegations of said paragraph which refer to or are intended to refer to others.

10. Deny each and every allegation contained in paragraph 10 of the complaint, except admit that in 1941 the United States Department of Justice commenced an action in this Court against ASCAP entitled United States v. American Society of Composers, Authors and Publishers, et al., S.D.N.Y. Civ. 13-95, and that the action was resolved by the entry of a judgment by consent of the parties, filed March 4, 1941, and respectfully refer this Court to said complaint and judgment for the terms thereof.

11. Deny each and every allegation contained in paragraph 11 of the complaint, except admit that the 1941 decree was superseded by the Amended Final Judgment filed in this Court on March 14, 1950, and respectfully refer this Court to said Amended Final Judgment for the terms thereof.

12. Deny knowledge or information sufficient to

form a belief as to the truth of the allegations contained in paragraph 12 of the complaint, except admit that BMI is subject to a consent judgment filed in this Court on November 29, 1966 in an antitrust action entitled United States v. Broadcast Music, Inc. and RKO General, Inc., S.D.N.Y. 64 Civ. 3787, and respectfully refer this Court to said judgment for the terms thereof.

13. Deny each and every allegation contained in paragraph 13 of the complaint which refers or is intended to refer to defendant ASCAP, and respectfully refer this Court to the aforesaid Amended Final Judgment for the terms thereof, and deny knowledge or information sufficient to form a belief as to the truth of the allegations of said paragraph 13 which refer or are intended to refer to defendant BMI.

14. Deny each and every allegation contained in paragraph 14 of the complaint which refers or is intended to refer to defendant ASCAP, except admit on information and belief that for many years plaintiff has furnished to stations owned and operated by it and to its affiliated stations network programs containing performances of copyrighted musical compositions in the ASCAP repertory and has requested and received licenses permitting it to use any, some or all of the musical compositions in the ASCAP repertory, and respectfully refer this Court to the various agreements between plaintiff and ASCAP for the terms of said licenses; and deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in said paragraph 14 which refer or are intended to refer to defendant BMI.

15. Deny each and every allegation contained in paragraph 15 of the complaint which refers or is intended to

refer to them or other ASCAP members, except admit and aver that it is essential that plaintiff and the other television networks obtain licenses for the non-dramatic public performance for profit of many if not all copyrighted musical compositions; that ASCAP has approximately 16,000 members who own performance rights to hundreds of thousands of such compositions; that there are in many cases multiple ownership interests or claims with respect to performance rights of a copyrighted musical composition; and that ASCAP members reside in various states of the United States and in some foreign countries; and deny knowledge or information sufficient to form a belief as to the truth of the allegations of said paragraph which refer or are intended to refer to defendant BMI.

16. Deny each and every allegation contained in paragraph 16 of the complaint which refers or is intended to refer to defendant ASCAP, except admit that ASCAP received a letter from plaintiff on or about December 22, 1969, a copy of which is annexed to the complaint as Exhibit A, and respectfully refer this Court to said Exhibit for the terms thereof, and deny knowledge or information sufficient to form a belief as to the truth of the allegations of said paragraph which refer or are intended to refer to defendant BMI.

17. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 17 of the complaint.

18. Deny each and every allegation contained in paragraph 18 of the complaint, except admit that on or about December 23, 1969 ASCAP wrote a letter to plaintiff, a copy of which is annexed to the complaint as Exhibit C, and respectfully refer this Court to said Exhibit for the terms

thereof.

19. Deny each and every allegation contained in paragraph 19 of the complaint which refers or is intended to refer to defendant ASCAP, and deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in said paragraph which refer or are intended to refer to defendant BMI.

20. Deny each and every allegation contained in paragraph 20 of the complaint which refers or is intended to refer to them or to other ASCAP members, and deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in said paragraph which refer or are intended to refer to others.

21. Deny each and every allegation contained in paragraph 21 of the complaint which refers or is intended to refer to them or to other ASCAP members, and deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in said paragraph which refer or are intended to refer to others.

22. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 22 of the complaint, except admit and aver that subsequent to the filing of the complaint plaintiff, pursuant to the 1950 Amended Final Judgment, has applied to ASCAP and been granted the right to perform any, some or all of the compositions in the ASCAP repertory for specified periods of time.

23. Deny each and every allegation contained in paragraph 23 of the complaint which refers to or is intended to refer to them or to other ASCAP members, and deny knowledge

or information sufficient to form a belief as to the truth of allegations in said paragraph 23 which refer or are intended to refer to others.

AS AND FOR A FIRST SEPARATE AND COMPLETE DEFENSE, THESE DEFENDANTS ALLEGE:

24. The complaint fails to state a claim against any of them upon which relief can be granted.

AS AND FOR A SECOND SEPARATE AND COMPLETE DEFENSE, THESE DEFENDANTS ALLEGE:

25. The claims alleged in the complaint against them are barred in whole or in part by the applicable statute of limitations.

AS AND FOR A THIRD SEPARATE AND COMPLETE DEFENSE, THESE DEFENDANTS ALLEGE:

26. Plaintiff is barred from maintaining this action against them by reason of laches.

AS AND FOR A FOURTH SEPARATE AND COMPLETE DEFENSE, THESE DEFENDANTS ALLEGE:

27. Plaintiff is barred from maintaining this action against these defendants by reason of its unclean hands as hereinafter alleged in paragraphs 29 through 62.

AS AND FOR A FIFTH SEPARATE AND COMPLETE DEFENSE, THESE DEFENDANTS ALLEGE:

28. The injunctive relief demanded in the complaint, if granted against them, would place the Court in the position of maintaining, perpetuating and encouraging violations of law presently being committed by plaintiff as hereinafter alleged in paragraph 29 through 62. The

action is therefore against public policy and cannot be maintained against them.

AS AND FOR A SIXTH SEPARATE AND COMPLETE DEFENSE, AND A FIRST COUNTERCLAIM AGAINST PLAINTIFF AND COUNTERDEFENDANT NATIONAL BROADCASTING COMPANY, INC., THESE DEFENDANTS ALLEGE ON INFORMATION AND BELIEF:

29. Counterclaiming defendants seek judgment herein restraining and preventing plaintiff and counterdefendant NBC from continuing the violations of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2) hereinafter alleged. Such violations of law were entered into and are being carried out in part within the Southern District of New York and within the jurisdiction of this Court. Jurisdiction is founded upon 15 U.S.C. § 26 and 28 U.S.C. § 1337.

30. ASCAP is an unincorporated association having its principal office in the City, County and State of New York. Its approximately 16,000 members authorize it to license on a non-exclusive basis for limited periods of time, certain rights of non-dramatic public performance for profit of musical compositions written, composed, published or copyrighted by them.

31. Plaintiff is a corporation organized under the laws of the State of New York and having its principal place of business in the City, County and State of New York. Through its division, CBS Television Network ("CBS Television"), plaintiff is one of the two most powerful national television broadcasting networks; and through the CBS Radio Division it is one of the four national radio broadcasting networks. Plaintiff also owns and operates a number of key television

and radio broadcasting stations. The television stations are located in New York (WCBS-TV), Los Angeles (KNXT-TV), Chicago (WBBM-TV), Philadelphia (WCAU-TV) and St. Louis (KMOX-TV); the radio stations, both AM and FM, are located in each of the same cities and also in San Francisco and Boston. In addition, plaintiff owns and operates a number of cable television (CATV) systems. Its Cinema Center Films Division produces feature length motion pictures for exhibition in theatres and over television in the United States and abroad. Its CBS Records Division is the largest producer, manufacturer and distributor of records in the United States and maintains the world's largest catalogue. Plaintiff also engages in numerous other diversified business activities, including a major publishing firm (Holt, Rinehart & Winston, Inc.), the New York Yankees professional baseball team, and other interests.

32. NBC is a corporation organized under the laws of the State of Delaware and having its principal place of business in the City, County and State of New York. NBC is a 100% owned subsidiary of RCA Corporation ("RCA"), a Delaware corporation having its principal place of business in the City, County and State of New York. Through its division, NBC Television Network ("NBC Television"), NBC is the other of the two most powerful television broadcasting networks, and through the NBC Radio Network it is also one of the four national radio broadcasting networks. NBC also owns and operates a number of key television and radio broadcasting stations: the television stations are located in New York (WNBC-TV), Los Angeles (KNBC-TV), Chicago (WMAQ-TV), Cleveland (WKYC-TV) and Washington, D.C. (WRC-TV), and the radio

stations, both AM and FM, are located in each of the same cities except Los Angeles, and also in San Francisco and Pittsburgh. RCA, through its RCA Victor Record Division, is one of the largest producers, manufacturers and distributors of recorded music in the United States, and also engages in numerous other business activities, including a major publishing firm (Random House).

33. BMI is a corporation organized under the laws of the State of New York and having its principal place of business in the City, County and State of New York. BMI is engaged in the business, among other things, of acquiring from copyright owners and others on behalf of the broadcasting industry exclusive rights of non-dramatic public performance for profit of copyrighted musical compositions, and granting to users, including television and radio networks and broadcasting stations, non-exclusive licenses for such performances.

TRADE AND COMMERCE INVOLVED

34. The right to perform musical compositions for profit is one of the rights secured to the copyright owner under the Copyright Law of the United States, 17 U.S.C. §§ 1 et seq. Copyrighted musical compositions may not lawfully be performed publicly for profit without obtaining an appropriate license. Non-exclusive licenses have heretofore been granted by ASCAP for public performances for profit of the copyrighted musical compositions in the ASCAP repertory to plaintiff and NBC for their respective television and radio networks and owned and operated stations, as well as to other television and radio networks and stations through-

out the United States. The receipts from such licenses are apportioned by ASCAP among its members and constitute a substantial portion of their financial receipts. Such performances are regularly and continuously broadcast across state lines and through and by means of instrumentalities of interstate commerce.

35. Plaintiff, NBC, and the other television and radio networks and stations in the United States are each engaged in commerce among the several states and with foreign nations. Each broadcaster transmits its programs across state or national boundaries. Each station is operated under a license issued by the Federal Communications Commission pursuant to Title III of the Communications Act of 1934, as amended (47 U.S.C. §§ 301 et seq.). The performance of copyrighted musical compositions is an important factor in the program structure of broadcasting.

36. There are over 600 operating commercial television stations in the United States, but there are only three national television networks, CBS Television, NBC Television and the ABC television network of American Broadcasting Companies, Inc. CBS Television and NBC Television are the largest networks. Each is composed of (a) the five stations which it owns and operates and which are located in certain of the largest local television markets in the country, together with (b) approximately 200 additional affiliated stations, serving virtually every other community across the country, which are owned, and licensed by the Federal Communications Commission ("FCC") for operation, by others but which are in fact tied to the network through affiliation contracts, thus giving each network access for

all its programs to substantially all American homes equipped with television sets.

37. CBS Television and NBC Television each produces and procures programs, arranges for sponsorship and supplies a continuous, coordinated schedule for its affiliated stations. Each acts as sales agent for its affiliates and compensates them for carrying its programs, including the commercial announcements sold by the network which must be taken and broadcast as a part of the program material.

38. CBS Television and NBC Television, and each of them, constitute a substantial portion of the market for television broadcasting of copyrighted musical compositions. Each provides national advertisers with unique coverage of the national television viewing public. Collectively, and singly, they have and exercise effective control over access to the television broadcasting facilities of a substantial number of stations and over the content of programs broadcast over such facilities.

39. CBS Television and NBC Television, and each of them, constitute a dominant portion of the market for network television broadcasting of copyrighted musical compositions during the "prime time" evening hours when audiences are largest. Each provides national advertisers with unique coverage of the national television viewing public during the "prime time" evening hours. Collectively, and singly, they have and exercise effective control over access to the "prime time" television broadcasting facilities of a substantial number of stations and over the content of

programs broadcast over such facilities.

40. The five television stations owned and operated by plaintiff in New York, Los Angeles, Chicago, Philadelphia and St. Louis are licensed for operation by the FCC under Title III of the Communications Act of 1934, as amended (47 U.S.C. §§ 301 et seq.). They provide advertisers with unique coverage of audiences in certain of the largest television markets in the country, and together they constitute a substantial portion of the market for television broadcasting of copyrighted musical compositions.

41. The five television stations owned and operated by NBC in New York, Los Angeles, Chicago, Cleveland and Washington, D.C. are licensed for operation by the FCC under Title III of the Communications Act of 1934, as amended (47 U.S.C. §§ 301 et seq.). They provide advertisers with unique coverage of audiences in certain of the largest television markets in the country, and together they constitute a substantial portion of the market for television broadcasting of copyrighted musical compositions.

OFFENSES

42. Plaintiff and NBC, together with others, have been engaged for many years in a wrongful and unlawful combination and conspiracy in restraint of interstate and foreign trade and commerce in the broadcasting of musical compositions, and in an unlawful combination, conspiracy and attempt to monopolize the broadcasting of copyrighted musical compositions, in violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2), and have combined, agreed and conspired to do all acts and things and to use all means

necessary and appropriate to make said restraints and monopoly effective, including the means, acts and things hereinafter more particularly alleged. Plaintiff and NBC, individually and collectively if not always collusively, by the means, acts and things hereinafter more particularly alleged, have also achieved monopoly power over program materials and access to the television facilities, generally and also during the "prime time" hours, of the stations constituting their networks, and have used their monopoly power to deny to authors, composers and publishers access to a free and unrestrained market for the performance of their copyrighted musical compositions and the licensing of performances of their copyrighted musical compositions, all in violation of Sections 1 and 2 of the Sherman Act. Said violations continue to the date of filing of this counterclaim, and threaten to continue, throughout the United States, including the Southern District of New York.

43. In and prior to 1939, and prior to the advent of commercial television broadcasting, radio stations owned by or affiliated with plaintiff or NBC utilized more than 85% of the total night-time wattage of all stations in the United States. The monopoly so achieved by plaintiff and NBC had been obtained and was maintained in part by means of ownership and control of key radio stations, by restrictive terms and conditions of affiliation contracts with the many stations affiliated with each of them, and by other unfair and restrictive acts and practices.

44. Commencing in or about 1939 and continuing to the present time, plaintiff and NBC have taken numerous actions, both singly and collectively, and in concert with

others, designed and intended to consolidate and expand their power to control, restrain and fix the price to be paid for the broadcast use of music.

45. In 1939, plaintiff, NBC, the National Association of Broadcasters (a trade association of the broadcasters), and other leading broadcasters, acting on behalf of the broadcasting industry, organized BMI as a corporation to acquire exclusive rights of public performance of copyrighted musical compositions. By means of purchase, or by term contracts with the owners of copyrights to musical compositions, BMI began (a) obtaining on behalf of the broadcasting industry the exclusive right to license the public performance for profit of musical compositions, and (b) granting licenses to the various networks and broadcasters at prices fixed by the networks and other representatives of the broadcasting industry. Licenses were also offered to other users.

46. BMI's stock was offered and issued only to the radio networks and broadcasting stations, a great number of which were owned and operated by, or affiliated with, plaintiff and NBC respectively. Broadcasting stations affiliated with plaintiff and NBC have had and continue to have a proprietary interest in BMI. At all times since its inception, all of BMI's stock has been owned solely by broadcasters, its directors have been officers, directors, representatives or nominees of broadcasters, and BMI has served the collective interests of the entire broadcasting industry. BMI's stockholders have each agreed among themselves, and with plaintiff, NBC and the other broadcasters, that none of them will sell its stock except to a successor broadcaster or to BMI. When plaintiff and NBC disposed of

their stock in 1959, they turned it back to BMI.

47. Unlike ASCAP, BMI is not a membership organization operated by and for the authors, composers and publishers of musical compositions. Neither is BMI an independent corporation operated for the benefit of its stockholders. For example, by agreement, no dividends have been or will be distributed to BMI stockholders. BMI has been used for the sole benefit of the entire broadcasting industry to control and depress the price to be paid by that industry to authors, composers and publishers, and to attempt to influence the public taste in favor of BMI music as opposed to the music of writers and publishers who refuse to grant performance rights to the networks and broadcasters through BMI.

48. A musical composition is not likely to achieve popularity unless it has come to the public's attention by means of broadcasting. Conversely, a demand for certain musical compositions can be created by repeated broadcasts and those compositions may thereby be made popular.

49. The broadcasting industry has the power to determine which musical compositions shall be performed by means of broadcasting. It thereby has the power to select the musical compositions owned or controlled by members of the industry or BMI rather than those which are not so owned or controlled. This choice can often be made irrespective of the merits of the various musical compositions.

50. Using their control over the content of television and radio network programming, and over the entire programming of their owned and operated television and radio stations, plaintiff and NBC, together with other broadcasters,

systematically favored and promoted musical compositions owned by them or licensed to them by BMI in increasingly greater proportions. As a result, the broadcasting industry, through BMI, has attained a position of dominance in the charts of current hit songs. In 1969, more than 80% of the list of "Hot 100" recordings published by BILLBOARD weekly were licensed by BMI, and its percentages in BILLBOARD's "Best Selling Soul Singles" (top 50 rhythm and blues) and "Hot Country Singles" (top 75 country and western) categories were even higher.

51. Upon the advent of commercial television broadcasting in the late 1940's, plaintiff and NBC each moved to establish a dominant position in the new market for television broadcasting, which has since become the most important medium of public entertainment. Through CBS Television and NBC Television, respectively, they achieved such positions during the 1950's and proceeded to obtain monopoly control over access to television broadcasting facilities of hundreds of affiliated television stations.

52. Prior to 1963, CBS Television and NBC Television held options on most of the "prime time" of their affiliates through provisions of their affiliation contracts. Despite FCC prohibition in 1963 of such option provisions, CBS Television and NBC Television still supply substantially all of the "prime time" television programs broadcast over the facilities of their affiliated stations. During 1968, television stations owned by or affiliated with the three television networks, of which CBS Television and NBC Television are the largest, carried an average of only 1.2 to 1.6 hours per week of non-network programs during the hours of 7:30-10:30 P.M.

53. Plaintiff and NBC have joined to their monopoly over "prime time" television broadcasting facilities a further monopoly over the production, procurement and distribution of the programs broadcast over such facilities. Between 1957 and 1968, the share of all network evening program hours either produced or directly controlled by the three networks rose from 67.2% to 96.7%. If entertainment programs alone are considered, network produced or controlled evening hours rose from 64.4% in 1957 to 96.2% in 1968. In the case of CBS Television, the percentage of independently provided evening programs declined from 31.8% in 1957 to 2.7% in 1968, and the use of such programs by NBC Television declined from 37.8% in 1957 to 5.4% in 1968.

54. This has resulted from, among other things, a decline in the networks' use of programs furnished and determined by the sponsor. Instead of the sponsor furnishing his own program and purchasing air time to have his program televised, the networks themselves furnish the program material, either producing it themselves or obtaining it from packagers, and selling advertising in the form of commercial announcements or "spots". Ninety percent or more of network evening advertising is now sold in the form of spots, in units of one minute or, increasingly, 30 seconds, to multiple sponsors for network-controlled shows.
CBS Television and NBC Television have also established and maintained their domination over the production, procurement and distribution of programs broadcast by their respective affiliates by, among other practices, refusing to accept for network exhibition new, independently produced programs unless the network receives subsidiary rights or other financial interests in the program.

55. Thus, in exercising their monopoly control over the content of programs broadcast over network facilities, CBS Television and NBC Television have been steadfastly committed to continuing participation in every stage of the creative process from the initial script to the final broadcast, and for all practical purposes control their entire network television program production process from idea through exhibition.

56. Secure in their monopoly control over the prime time on the television broadcasting facilities of their networks and over the musical content of the programs broadcast over such facilities, plaintiff and NBC recently embarked on a plan and program designed to use that power to restructure and depress the price each pays for performance rights of musical compositions. The said plan and program has been and is being effectuated in part by the following acts:

(a) In March 1962, pursuant to Section IX of the Amended Final Judgment, plaintiff had petitioned this Court to set a reasonable license fee for use on its television network of the compositions in the ASCAP repertory. In 1966 plaintiff had reached accord with ASCAP on the basis of payments for license fees for the years through December 31, 1969, subject to the preparation of license agreements. Said agreements were prepared and agreed to in 1969 and submitted jointly to this Court at a hearing on April 9, 1969. On April 15, 1969, the Court entered an order approving the agreements, but plaintiff thereafter unilaterally refused to sign the approved agreements. In December

1969 plaintiff and ASCAP agreed on modified versions of the April 1969 agreements, deleting certain provisions which, by then, had become academic, and each separately sought an order with respect thereto. On January 12, 1970 this Court entered an order accepting the agreements as a "final determination" in the proceeding. Despite this second order plaintiff refused to make payment of the license fees owed ASCAP pursuant to the agreements and moved to "alter, amend or vacate" the order of January 12, 1970. When that motion was denied, plaintiff, still refusing to make payment, appealed and petitioned for a writ of mandamus to the Court of Appeals, and ASCAP cross-moved on April 1, 1970 to dismiss. Thereafter, on April 3, 1970 plaintiff agreed with ASCAP to dismiss its appeal and petition and made payment of the license fees owed ASCAP.

(b) In March 1962 NBC also petitioned this Court to set a reasonable license fee for use by its television network of the compositions in the ASCAP repertory. At the aforesaid hearing before this Court on April 9, 1969, NBC moved for approval of an agreement on such license fees with ASCAP for the years through December 31, 1969, and thereafter NBC and ASCAP signed said agreement and it was approved on consent of the parties by this Court on April 28, 1969. Nine months after the entry, on its consent, of that order NBC moved to conform that order with the CBS order of January 12, 1970, which motion was denied by order dated January 26, 1970. NBC then noticed an appeal to the Court of Appeals. NBC has failed to prosecute its appeal.

(c) On or about December 19, 1969, plaintiff advised ASCAP that it believed the form of license agreed to by it and ASCAP for many years was unfair and unlawful, and it requested that ASCAP submit to it an offer for a license commencing January 1, 1970, providing for payments measured by the actual use of ASCAP music selected by CBS Television.

(d) Notwithstanding ASCAP's stated willingness to discuss plaintiff's request for a new performing rights license, on or about December 31, 1969 plaintiff instituted this action against ASCAP, BMI and others alleging, inter alia, that ASCAP had rejected its request for a new performing rights license and that ASCAP was "misusing" the copyrights of musical compositions in its repertory, and seeking injunctive relief. There is no basis in fact or law for these allegations.

(e) Since that time, plaintiff has continued to request and receive licenses under the Amended Final Judgment, covering successive periods of 60 days each, currently extending to June 30, 1970.

(f) On or about March 10, 1970, NBC purported to apply under the Amended Final Judgment for a license from ASCAP commencing January 1, 1970 and ending December 31, 1974, for its television network covering only the 2217 musical compositions and certain background music libraries contained in a list prepared by NBC from ASCAP's repertory. This request departed from NBC's uniform practice over many years of negotiating with ASCAP for a license covering all compositions in the ASCAP repertory, and is not in accordance with, but is

contrary to, the language, intent and spirit of the Amended Final Judgment as well as the antitrust laws. Since January 1, 1970 NBC has used and intends to continue to use ASCAP compositions in addition to those on the list of 2217. NBC, in papers filed in this Court in support of its application on behalf of NBC Television for an interim fee, has stated its intention to seek from ASCAP a license for those additional compositions up to the time certain of its claims are decided by this Court, thereafter to seek performing rights licenses directly from the individual ASCAP members prior to performance of their compositions, and to foreclose the use of such compositions on the network unless the individual composer or publisher agrees to grant licenses on what NBC Television considers "competitive terms."

57. The purpose, intent and threatened effect of the above acts by plaintiff and NBC are to use their monopoly power over television broadcasting of musical compositions to deny authors, composers and publishers the opportunity to negotiate on a fair and equitable basis for the use of their musical compositions in broadcasting.

58. Unless restrained, plaintiff and NBC, together with others, by means of the aforesaid combination, conspiracy and monopoly in violation of Sections 1 and 2 of the Sherman Act, will wrongfully fix and depress the prices paid to writers and publishers of copyrighted musical compositions for the right to perform their compositions publicly for profit, will deprive persons creating or owning copyrighted musical compositions or the public performance

rights thereto of free access to the market for the performance of copyrighted musical compositions represented by the broadcasting thereof, and will deprive the listening public of the opportunity to listen to and become familiar with copyrighted musical compositions chosen on the basis of merit, all in disregard of the public convenience, interest and necessity.

AS AND FOR A SEVENTH SEPARATE AND COMPLETE DEFENSE, AND A SECOND COUNTERCLAIM AGAINST PLAINTIFF AND NBC, AND EACH OF THEM, THESE DEFENDANTS ALLEGE ON INFORMATION AND BELIEF:

59. Repeat and reallege the allegations of paragraphs 29-58 herein as though here set forth in full.

60. Plaintiff, by means of the acts hereinabove alleged and with the intent, purpose and effect hereinabove alleged, has attempted to monopolize, and has monopolized, substantial portions of the market for the broadcasting of copyrighted musical compositions represented by (i) its five owned and operated television stations, and (ii) the CBS Television Network, during both "prime time" and the entire broadcasting day, all in violation of Section 2 of the Sherman Act.

61. NBC, by means of the acts hereinabove alleged and with the intent, purpose and effect hereinabove alleged, has attempted to monopolize, and has monopolized, substantial portions of the market for the broadcasting of copyrighted musical compositions represented by (i) its five owned and operated television stations and (ii) the NBC Television Network during both "prime time" and the entire broadcasting day, all in violation of Section 2 of the Sherman Act.

62. Plaintiff and NBC, by means of the acts hereinabove alleged and with the intent, purpose and effect hereinabove alleged, have attempted to monopolize, and have monopolized, substantial portions of the market for the broadcasting of copyrighted musical compositions represented by (i) their owned and operated television stations and (ii) their television networks during both "prime time" and the entire broadcasting day, all in violation of Section 2 of the Sherman Act.

WHEREFORE, these defendants demand judgment:

1. Dismissing the complaint with prejudice;

2. Adjudging and decreeing that plaintiff and NBC have conspired to restrain and monopolize, constitute a combination to restrain and monopolize, are engaged in an attempt to monopolize, and have monopolized, interstate trade and commerce in the broadcasting of copyrighted musical compositions in violation of Sections 1 and 2 of the Sherman Act;

3. Adjudging and decreeing that plaintiff in its operation of the CBS Television Network constitutes a combination to restrain and monopolize, is engaged in an attempt to monopolize, and has monopolized, interstate trade and commerce in the broadcasting of copyrighted musical compositions in violation of Sections 1 and 2 of the Sherman Act;

4. Enjoining and restraining plaintiff from hereafter producing, selling, purchasing, distributing, licensing, syndicating or otherwise having any interest in or control over any television program other than news and public affairs programs in connection with the operation of the CBS television network.

5. Adjudging and decreeing that NBC in its operation of the NBC Television Network constitutes a combination to restrain and monopolize, is engaged in an attempt to monopolize, and has monopolized, interstate trade and commerce in the broadcasting of copyrighted musical compositions in violation of Sections 1 and 2 of the Sherman Act;

6. Enjoining and restraining NBC from hereafter producing, selling, purchasing, distributing, licensing, syndicating, or otherwise having any interest in or control over any television program other than news and public affairs programs, in connection with the operation of its television network;

7. Adjudging and decreeing that, pursuant to the provisions of Section 313(a) of the Communications Act of 1934, as amended, each of the licenses issued by the Federal Communications Commission pursuant to said Act authorizing plaintiff and NBC, respectively, to own and operate television broadcasting stations shall, as of the date the judgment becomes finally effective, be revoked and that all rights under such licenses shall thereupon cease;

8. Enjoining and restraining plaintiff and NBC, and each of them, from continuing their illegal acts as hereinabove alleged; and

9. Awarding to these defendants such other and further relief as may in the premises be just and proper,

together with their costs and disbursements, including reasonable attorneys' fees.

Dated: New York, New York
May 28, 1970

SULLIVAN & CROMWELL

By ROY H. STEYER
(a member of the firm)

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HA. 2-8100

and

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Attorneys for defendants-counterclaimants ASCAP, Stanley Adams, Harold Arlen, Samuel Barber, Carl Fischer, Inc., Chappell & Co., Inc., Edwin H. Morris & Co., Inc., Elkan-Vogel, Inc., Essex Music, Inc., Famous Music Corp., Henry N. Mancini, Peter Mennin, Milene Music, Inc., Robbins Music Corporation, Richard Rodgers, and Shapiro, Bernstein & Co., Inc.

EXCERPTS FROM BMI ANSWER AND COUNTERCLAIMS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

COLUMBIA BROADCASTING SYSTEM, INC., :

Plaintiff, : 69 Civ. 5740

-against- : ANSWER AND COUNTERCLAIMS

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al., :

Defendants. :

- -x

Defendants Broadcast Music, Inc. and Al Gallico Music Corp., Paul Anka, Jerry Bock, Fred Ebb, Edward B. Marks Music Corp., Norman Gimbel, Sheldon Harnick, Hill and Range Songs, Inc., Hollis Music, Inc., John Kander, Charles Koppelman, Maclen Music, Inc., Peer International Corporation, Don Rubin, Joseph Stein, Sunbeam Music Corp. and Unart Music Corp., by their undersigned attorneys, answer the complaint herein as follows:

1. Deny each and every allegation contained in paragraph 1 of the complaint, except admit that the matter in controversy exceeds the value of $10,000 exclusive of interest and costs.

2. Admit the allegations of paragraph 2 of the complaint, except aver that plaintiff also supplies network television programs to five television stations owned and operated by plaintiff.

3. Deny each and every allegation contained in paragraph 3 of the complaint, except admit that the businesses of BMI and ASCAP of licensing non-dramatic

public performances for profit of copyrighted musical compositions are businesses in interstate commerce, and that such businesses affect interstate commerce in the distribution of television network programs and the sale of broadcast time.

4. Deny knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraph 4 of the complaint, except admit that ASCAP is an unincorporated association with its principal office at 575 Madison Avenue, New York, New York and that ASCAP is engaged in the business of granting licenses to others for the non-dramatic public performance for profit of the copyrighted musical compositions of its members.

5. Deny each and every allegation contained in paragraph 5 of the complaint, except admit that BMI is a New York corporation with its principal office at 589 Fifth Avenue, New York, New York and that BMI has entered into agreements with approximately 28,000 corporations or individuals (hereinafter "BMI affiliates") giving BMI the exclusive right to grant licenses to others for the non-dramatic public performance for profit of the copyrighted musical compositions of such affiliates.

6. Deny knowledge or information sufficient to form a belief as to the truth of any of the allegations of paragraph 6 of the complaint, except admit on information and belief that defendants Harold Arlen, Samuel Barber, Cy Coleman, Morton Gould, Arthur Hamilton, Henry N. Mancini, Peter Menn[illegible], Richard Rodgers, Arthur Schwartz, Ned Washington, Chappell & Co., Inc., Essex Music, Inc., Famous

Music Corp., Carl Fisher, Inc., MCA, Inc., Edwin H. Morris & Co., Inc., Robbins Music Corp., Shapiro, Bernstein & Co., Inc., G. Schirmer, Inc., Warner Brothers - 7 Arts Inc., Elkan-Vogel, Inc., and Milene Music, Inc. are ASCAP members.

7. Deny knowledge or information sufficient to form a belief as to the truth of any of the allegations of paragraph 7 of the complaint, except admit that defendants Al Gallico Music Corp., Paul Anka, Associated Music Publishers, Inc., Jerry Bock, Duchess Music Corp., Fred Ebb, Edward B. Marks Music Corp., Norman Gimbel, Sheldon Harnick, Hill and Range Songs, Inc., Hollis Music, Inc., John Kander, Charles Koppelman, Maclen Music, Inc., Peer International Corporation, Don Rubin, Screen-Gems Columbia Music, Inc., Joseph Stein, Sunbeam Music Corp., and Unart Music Corp. are BMI affiliates, and except that defendant Sunbeam Music Corp. denies that its name is Sunbeam Music, Inc. and avers that it is Sunbeam Music Corp. and except that defendants Anka, Bock, Ebb, Gimbel, Harnick, Kander, Koppelman, Rubin and Stein each admits that he resides or is found in the Southern District of New York or another district within the State of New York, and except that defendants Al Gallico Music Corp., Edward B. Marks Music Corp., Hill and Range Songs, Inc., Hollis Music, Inc., Maclen Music, Inc., Peer International Corporation, Sunbeam Music Corp. and Unart Music Corp. each admits that it has its principal office in the Southern District or another district within the State of New York.

8. Deny each and every allegation contained in paragraph 8 of the complaint, except admit that BMI affiliates constitute a class, that such class is so

numerous that joinder of all its members would be impracticable, that the defenses and counterclaims of the representative parties will be typical of the defenses and counterclaims of the class, and that the representative parties will fairly and adequately protect the interests of absent members of the class, and except deny knowledge or information sufficient to form a belief as to the truth of any of the allegations of paragraph 8 insofar as they relate to the alleged class of ASCAP members.

9. Deny each and every allegation contained in paragraph 9 of the complaint.

10. Deny knowledge or information sufficient to form a belief as to any of the allegations contained in paragraph 10 of the complaint, except admit that in 1941 the United States Department of Justice commenced an action entitled United States v. American Society of Composers, Authors and Publishers, Ci. No. 13-95, charging ASCAP with antitrust violations and that the action was resolved by the entry of a consent decree filed March 4, 1941, and refer to said consent decree for the terms thereof.

11. Deny each and every allegation contained in paragraph 11 of the complaint, except admit that the 1941 decree was superseded by the Amended Final Judgement filed in this Court on March 14, 1950, and refer to said Amended Final Judgement for the terms thereof.

12. Deny each and every allegation contained in paragraph 12 of the complaint, except admit that BMI is subject to a consent decree arising out of a government antitrust action, that such decree was filed in this Court

on November 29, 1966, in United States v. Broadcast Music, Inc. and RKO General, Inc., Civ. No. 37-87, superseding a decree filed in 1941 in the United States District Court for the Eastern District of Wisconsin, and refer to said consent decree, a copy of which is annexed hereto as Exhibit 1, for the terms thereof.

13. Admit the allegations of paragraph 13 of the complaint.

14. Deny each and every allegation contained in paragraph 14 of the complaint, except deny knowledge or information sufficient to form a belief as to the truth of any of the allegations insofar as they relate to ASCAP, and except admit that for a number of years prior to December 31, 1969, plaintiff furnished to its affiliated stations and to stations owned and operated by it network programs containing performances of copyrighted musical compositions in the BMI repertory, that for that purpose during the period prior to December 31, 1969, plaintiff requested and received "blanket" licenses permitting it to use all musical compositions in such repertory, in return for a percentage of its net receipts from advertisers after deductions, irrespective of the extent to which or manner in which plaintiff chose to exercise its right thus acquired to use all of such music.

15. Deny each and every allegation contained in paragraph 15 of the complaint, except admit that it is essential to plaintiff, in order to enable it to compete with other television networks, that it have the right to use many, if not all, musical compositions in the BMI repertory and that any attempt by plaintiff to acquire such

a large body of rights from the individual affiliates of BMI would be wholly impracticable in the light of the fact that BMI has thousands of affiliates owning copyrights to hundreds of thousands of musical compositions, that, in many cases, multiple parties, including individuals, companies, trusts or estates, own interests in, or have claims with respect to, performing rights of single copyrights and that such affiliates and parties are scattered throughout the world.

16. Deny each and every allegation contained in paragraph 16 of the complaint, except admit that BMI received a letter from plaintiff on or about December 22, 1969, a copy of which is annexed to the complaint as Exhibit A, and refer to said Exhibit for the terms thereof, and except deny knowledge or information sufficient to form a belief as to whether plaintiff delivered such letter to ASCAP.

17. Deny each and every allegation contained in paragraph 17 of the complaint, except admit that on or about December 23, 1969, BMI delivered to plaintiff a letter, a copy of which is annexed to the complaint as Exhibit B, and refer to said Exhibit for the terms thereof.

18. Deny knowledge or information sufficient to form a belief as to the truth of any of the allegations of paragraph 18 of the complaint.

19. Deny each and every allegation contained in paragraph 19 of the complaint, except deny knowledge or information sufficient to form a belief as to the truth of any of the allegations of paragraph 19 insofar as they relate to ASCAP.

20. Deny each and every allegation contained in paragraph 20 of the complaint.

21. Deny each and every allegation contained in paragraph 21 of the complaint.

22. Deny knowledge or information sufficient to form a belief as to the truth of any of the allegations of paragraph 22 of the complaint, except admit that on December 31, 1969 at 3:45 P.M. plaintiff delivered to BMI's offices a letter, a copy of which is annexed hereto as Exhibit 2.

23. Deny each and every allegation contained in paragraph 23 of the complaint.

AFFIRMATIVE DEFENSE

24. The complaint fails to state a claim upon which relief can be granted.

COUNTERCLAIMS OF DEFENDANTS BROADCAST MUSIC, INC., AL GALLICO MUSIC CORP., EDWARD B. MARKS MUSIC CORP., HILL AND RANGE SONGS, INC., HOLLIS MUSIC, INC., MACLEN MUSIC, INC., PEER INTERNATIONAL CORPORATION, SUNBEAM MUSIC CORP., AND UNART MUSIC CORP., individually and on behalf of all affiliates of Broadcast Music, Inc., similarly situated, AND OF COUNTERPLAINTIFFS LAKEVIEW MUSIC CO. LTD. and NORTHERN SONGS LIMITED.

25. Repeat and reallege paragraphs 2, 5, 7, 8, 14 and 17 hereof with the same force and effect as though here set forth in full.

26. These counterclaims arise under Title 17, U.S.C. § 101, as hereinafter more fully appears.

27.(a) BMI affiliates, including defendants Al Gallico Music Corp., Edward B. Marks Music Corp., Hill and Range Songs, Inc., Hollis Music, Inc., Maclen Music, Inc., Peer International Corporation, Sunbeam Music Corp. and Unart Music Corp., are now, and at the times of the infringements hereinafter alleged were, the owners of copyrights of approximately one million musical compositions. The claims of these BMI affiliates named as defendants are typical of the claims of the class of BMI affiliates; there are questions of law and fact common to the class; inconsistent adjudications with respect to individual members of the class would create incompatible standards of conduct for plaintiff; plaintiff has acted on grounds generally applicable to the class, as hereinafter alleged, thereby making final injunctive relief appropriate on behalf of the class as a whole; questions of law and fact common to the class predominate over questions affecting only individual members; and a class action is superior to other available methods for the fair and efficient adjudication of the controversies.

(b) Lakeview Music Co. Ltd. and Northern Songs Limited are corporations organized and existing under the laws of the United Kingdom. Lakeview Music Co. Ltd. and Northern Songs Limited are the owners of copyrights who have licensed certain BMI affiliates to exercise or grant rights under their United States statutory copyrights, and are hereby made parties plaintiff to the present counterclaims ("counterplaintiffs").

28. BMI is now, and at the time of the infringements hereinafter alleged was, the sole and exclusive licensee of the right to grant licenses for the non-dramatic public performance for profit (hereinafter "public performance licenses") of the compositions whose copyrights are owned by BMI affiliates (hereinafter collectively referred to as "BMI repertory"), including the compositions hereinafter mentioned.

29. On October 29, 1969, defendant BMI served on plaintiff a written notice that as of January 1, 1970, plaintiff's license to perform any of the compositions in the BMI repertory on its television network programs would be terminated.

30. On December 23, 1969, BMI delivered to plaintiff the letter attached to the complaint herein as Exhibit B, notifying plaintiff that as of January 1, 1970, absent a new agreement between BMI and plaintiff, any performances of music in the BMI repertory by CBS Television Network would constitute deliberate and willful copyright infringement under Sections 101 and 104 of 17 U.S.C. Said letter suggested that plaintiff contact BMI immediately with a view to reaching an agreement to avoid such deliberate and willful copyright infringement.

31. On December 31, 1969, BMI sent to plaintiff three telegrams, again notifying plaintiff that as of January 1, 1970 any performances of music in the BMI repertory by CBS Television Network would constitute deliberate and willful copyright infringement.

32. No new agreement was reached between BMI and plaintiff, and since 12:01 A.M. on January 1, 1970, plaintiff has had no license for the public performance of any of the compositions in the BMI repertory on the CBS Television Network.

33. From on and after January 1, 1970 plaintiff has deliberately and willfully, continuously and repeatedly engaged in infringements of copyrights on musical compositions in the BMI repertory through public performances for profit on plaintiff's television network.

34. Such infringements have been so numerous as to inhibit precise statement of their number except by estimate. To the best of BMI's knowledge, information and belief such infringements now number in the thousands. Among the infringements of which BMI is specifically aware are those set forth in paragraphs 35-44, relating to copyrights of which certain named defendants are the owners or exclusive United States licensees.

35. Defendant Al Gallico Music Corp. is the owner of the copyrights of the musical composition mentioned in this paragraph:

(a) Prior to March 4, 1964, Russ Damon, who then was and ever since has been a citizen of the United States, originated, created, wrote and composed an original musical composition entitled "Cotton Candy".

(b) Said musical composition contains a large amount of material which is wholly original and is copyrightable subject matter under the laws of the United States.

(c) Prior to March 4, 1964, Russ Damon sold and assigned his right to obtain statutory copyright of said musical composition to defendant Al Gallico Music Corp.

(d) On or about March 4, 1964, defendant Al Gallico Music Corp. complied in all respects with Title 17, U.S.C. and all other laws governing copyright and secured the exclusive rights and privileges in and to the copyright of said musical composition and received from the Register of Copyrights a certificate of registration, identified as follows: Class Eu, No. 815894.

(e) On or about April 20, 1964, defendant Al Gallico Music Corp. complied in all respects with Title 17, U.S.C. and all other laws governing copyright and secured the exclusive rights and privileges in and to the copyright of said musical composition and received from the Register of Copyrights a certificate of registration, identified

as follows: Class Ep, No. 186921.

(f) Since April 20, 1964, all copies of said musical composition published by defendant Al Gallico Music Corp. or under its authority or license have been printed and published in strict conformity with the provisions of Title 17, U.S.C. and all other laws governing copyright.

(g) On or about February 13, 1970, plaintiff deliberately and willfully infringed said copyright by causing said musical composition "Cotton Candy" to be publicly performed for profit on "Captain Kangaroo" on the CBS Television Network and thereby to be telecast over its affiliated stations throughout the United States.

(h) At the time of the infringement hereinabove mentioned, defendant Al Gallico Music Corp. was and still is the sole proprietor of the copyrights in said musical composition, and defendant Broadcast Music, Inc. was and still is the sole licensee of the right publicly to perform said musical composition for profit.

* * *

PARAGRAPHS 36-44

SET FORTH NUMEROUS ADDITIONAL ALLEGATIONS OF

COPYRIGHT INFRINGEMENTS

45. No copies of any of the infringing works of plaintiff referred to in paragraphs 35 through 44 hereof accompany these counterclaims since the infringements herein complained of consisted of the public performances for profit of musical compositions.

46. Plaintiff intends to continue to perform publicly for profit on various of its network television programs the copyrighted compositions referred to in paragraphs 35 through 44 hereof, and other compositions the copyrights of which are owned by the same defendants and counterplaintiffs, as well as other copyrighted compositions in the BMI repertory the copyrights of which are owned by others, thereby deliberately and willfully infringing the same.

47. The said wrongful acts of plaintiff have caused and are causing great injury and damage to defendant Broadcast Music, Inc. and to the defendant class of BMI affiliates. Unless this Court restrains plaintiff from the further commission of such acts said defendants will suffer irreparable injury, for which said defendants have no adequate remedy at law.

WHEREFORE, the undersigned defendants and counterplaintiffs demand judgment:

(a) dismissing the complaint in all respects;

(b) enjoining plaintiff, its agents, servants, and all persons acting under the direction, control, permission or license of plaintiff, during the pendency of this action and permanently from infringing in any manner the copyright of any musical composition now in or which shall hereafter be in the BMI repertory;

(c) requiring plaintiff to account for all gain, profits, and advantages derived by plaintiff from its aforesaid unlawful acts;

(d) awarding defendants such damages as defendants have sustained in consequence of plaintiff's aforesaid unlawful acts;

(e) awarding defendants punitive damages in the amount of at least six million ($6,000,000) dollars;

(f) requiring plaintiff to pay the costs of this action and reasonable attorneys' fees;

(g) granting defendants such other and further relief as is just.

Dated: New York, New York
April 6, 1970.

HUGHES HUBBARD & REED

By _____
A Member of the Firm

Attorneys for defendants Broadcast Music, Inc., Al Gallico Music Corp., Paul Anka, Jerry Bock, Fred Ebb, Edward B. Marks Music Corp., Norman Gimbel, Sheldon Harnick, Hill and Range Songs, Inc., Hollis Music, Inc., John Kander, Charles Koppelman, Maclen Music, Inc., Peer International Corporation, Don Rubin, Joseph Stein, Sunbeam Music Corp., and Unart Music Corp. and counterplaintiffs Lakeview Music Co. Ltd. and Northern Songs Limited

One Wall Street
New York, New York 10005
WH 3-6500

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

COLUMBIA BROADCASTING SYSTEM, INC., Plaintiff, -against- AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al., and BROADCAST MUSIC INC., et al., Defendants.	(M.E.L.) Civ. 5740
AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al., Defendants-Counterclaimants, -against- COLUMBIA BROADCASTING SYSTEM, INC., Plaintiff-Counterdefendant, NATIONAL BROADCASTING COMPANY, INC., Counterdefendant.	REPLY

Plaintiff, for its reply to the counterclaims of defendants American Society of Composers, Authors and Publishers ("ASCAP"), Stanley Adams, Harold Arlen, Samuel Barber, Carl Fischer, Inc., Chappell & Co., Inc., Edwin H. Morris & Co., Inc., Elkan-Vogel, Inc., Essex Music, Inc., Famous Music Corp., Henry N. Mancini, Peter Mennin, Milene Music, Inc., Robbins Music Corporation, Richard Rodgers, and Shapiro, Bernstein & Co., Inc.:

1. Denies the averments of paragraph 29, except that the counterclaims are purportedly based on, and jurisdiction purportedly conferred by, the statutes therein specified.

2. Denies the averments of the second and third sentences of paragraph 31, except that the CBS Television Network ("CTN"), a division of plaintiff, is one of the national television broadcasting networks, that the CBS Radio Division of plaintiff operates one of the national radio broadcasting networks and that plaintiff owns and operates a number of television and radio stations; denies the averment of the fourth sentence of paragraph 31 that the call letters of the television station it owns and operates in Los Angeles are KNXT-TV, and states that the call letters of that station are KNXT; and further states that it is without knowledge or information sufficient to form a belief as to the truth of the averment of the seventh sentence of paragraph 31 that the CBS Records Division maintains the world's largest catalogue.

3. Denies the averments of the third sentence of paragraph 32, except that the NBC Television Network, a division of NBC, is one of the television broadcasting networks and that the NBC Radio Network is one of the national radio broadcasting networks; and states that it is without knowledge or information sufficient to form a belief as to the truth of the averments of the fourth and fifth sentences of that paragraph, except that NBC owns and operates a number of television and radio broadcasting stations.

4. Denies the averments of the second sentence of paragraph 33, except that BMI is engaged in the business, among other things, of acquiring from copyright owners and others exclusive rights of nondramatic public performance for profit of copyrighted musical compositions and granting nonexclusive licenses to users, including television and

radio networks and broadcasting stations, for the public performance for profit of such copyrighted musical compositions.

5. Denies the averments of the first and second sentences of paragraph 34, except refers to the Copyright Law (17 U.S.C. §§ 1 et seq.) for the provisions thereof, and states that it is without knowledge or information sufficient to form a belief as to the truth of the averments of the fourth and fifth sentences of paragraph 34.

6. States that it is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 35, except that plaintiff is engaged in interstate and foreign commerce, that programs it offers are transmitted across state and national boundaries, that plaintiff's owned stations transmit programs across state lines (with the exception of television station KNXT [Los Angeles] and radio stations KNX-FM [Los Angeles], KCBS and KCBS-FM [San Francisco], and, in the case of AM radio station KNX, across a national boundary, that stations affiliated with plaintiff and plaintiff's own stations operate under licenses issued by the Federal Communications Commission ("FCC") pursuant to Title III of the Communications Act of 1934, as amended (47 U.S.C. §§ 301 et seq.), and that the use of musical compositions is competitively essential to plaintiff.

7. Denies the averments of paragraph 36 in so far as they relate to plaintiff and states that otherwise it is without knowledge or information sufficient to form a belief as to the truth of the averments of that paragraph, except that there are more than 600 operating commercial television

stations in the United States, that CTN, the NBC Television Network and the American Broadcasting Company, divisions, respectively, of plaintiff, NBC and American Broadcasting Companies, Inc., each operates as one of the national television networks, that CTN is affiliated in the United States with 187 television stations, that the affiliation agreements between CTN and those stations grant those stations the right to accept any CTN program but do not impose on those stations any obligation to do so, that plaintiff owns and operates five television stations and that those stations and affiliates are licensed by the FCC for operation.

8. Denies the averments of paragraph 37 in so far as they relate to plaintiff, except that plaintiff produces some programs and contracts with respect to the production of others, that plaintiff sells advertising time on most of those programs, that those programs are broadcast by the stations accepting them, that plaintiff supplies a schedule of programs which is changed from time to time and that plaintiff compensates the stations carrying those programs, and states that otherwise it is without knowledge or information sufficient to form a belief as to the truth of the averments of that paragraph.

9. Denies the averments of paragraphs 38, 39, 42, 43, 44, 47, 49, 51, 55, 57, 58, 61 and 62 in so far as they relate to plaintiff, and states that otherwise it is without knowledge or information sufficient to form a belief as to the truth of the averments of those paragraphs.

10. Denies the averments of the second sentence of paragraph 40.

11. States that it is without knowledge or informa-

tion sufficient to form a belief as to the truth of the averments of paragraph 41.

12. Denies the averments of paragraph 45 in so far as they relate to plaintiff and states that otherwise it is without knowledge or information sufficient to form a belief as to the truth of the averments of that paragraph, except states further that, in September 1939, various broadcasters, including plaintiff and NBC, and The National Association of Broadcasters and others organized BMI as a corporation to combat the monopolistic and predatory conduct of ASCAP by acquiring rights to grant public performance licenses to copyrighted musical compositions and that BMI has granted such licenses to networks, broadcasters and other users of music.

13. Denies the averments of the last clause of the third sentence of paragraph 46 in so far as they relate to plaintiff, and states that otherwise it is without knowledge or information sufficient to form a belief as to the truth of the averments of that paragraph, except that BMI's stock was issued to plaintiff and NBC and to many radio broadcasting stations, including stations affiliated with plaintiff and NBC, that plaintiff sold its BMI stock to BMI in 1959 and has not had any interest in BMI since that time and that provisions with respect to the transfer of BMI stock are contained in BMI's Certificate of Incorporation, to which reference is made for the contents thereof.

14. States that it is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 48, except that the broadcast of musical compositions often enhances the value of the copyrights

of such compositions.

15. Denies the averments of paragraph 50 in so far as they relate to plaintiff, states that otherwise it is without knowledge or information sufficient to form a belief as to the truth of the averments of that paragraph and states further that BMI has made claims corresponding to the averments of the third sentence of that paragraph in the BMI pamphlet entitled, "You and The Music You Use" (annexed as Exhibit 5 to the affidavit of Donald Sipes, sworn to July 7, 1970, and filed herein), to which reference is made for its contents.

16. Denies the averments of paragraph 52 in so far as they relate to plaintiff and states that otherwise it is without knowledge or information sufficient to form a belief as to the truth of the averments of that paragraph, except refers to pre-1963 affiliation agreements between plaintiff and its affiliates for their terms, refers to 47 C.F.R. § 73.658 for the provisions of the 1963 FCC regulations respecting "option time" and states that affiliation agreements to which plaintiff is or has been a party have always complied with those regulations.

17. Denies the averments of paragraph 53 in so far as they relate to plaintiff, states that otherwise it is without knowledge or information sufficient to form a belief as to the truth of the averments of that paragraph and states further that the percentage of programming produced by plaintiff of all programming offered by CTN to stations during the hours of 6:00 p.m. to 11:00 p.m. NYCT fell from 45.8% in 1957 to 17.9% in 1968 and that the percentage of entertainment programs produced by plaintiff of

all entertainment programming offered by CTN to stations during those hours fell from 42% in 1957 to 4.2% in 1968.

18. Denies the averments of paragraph 54 in so far as they relate to plaintiff and states that otherwise it is without knowledge or information sufficient to form a belief as to the truth of the averments of that paragraph, except states that the decline in the number of sponsor-furnished programs is attributable, not to any policy or practice of plaintiff, but to the substantial increases, since the advent of television, in the costs of program production and broadcasting facilities, to the disinclination of sponsors to incur those costs and risk poor audience acceptance of programs in which they had concentrated their advertising outlays and to their desire to spread such outlays over a greater number of programs, thereby minimizing those risks and exposing their products to a broader and more diverse audience; that CTN has sought to accommodate those objectives by selling advertising time in the form of commercial announcements on programs produced either by independent producers (packagers) or by CTN; and that 90% or more of the advertising appearing on CTN evening programs is sold in this form.

19. Denies the averments of paragraph 56 in so far as they relate to plaintiff and states that otherwise it is without knowledge or information sufficient to form a belief as to the truth of the averments of that paragraph.

20. Denies the averments of the second through ninth sentences of paragraph 56(a), except states that:

(a) In January 1966, plaintiff and ASCAP reached an accord on fees for use of music on CTN, both retro-

actively and prospectively through 1969, but subject to the execution of complete license agreements for the pre- and post-January 1, 1966, periods and with the understanding that the basis of payment for the period from 1966 through 1969 would apply for those years only and would not be binding upon or prejudicial to any position taken by either of the parties for subsequent years.

(b) Drafts of those agreements were submitted to this Court by plaintiff and ASCAP at a hearing held April 9, 1969, pursuant to Section IX of the Amended Final Judgment in United States v. American Society of Composers, Authors and Publishers, Civ. No. 13-95 ("the ASCAP consent decree"), in the proceeding entitled, In the Matter of the Application of Columbia Broadcasting System, Inc. ("the 1962 proceeding"). Although neither plaintiff nor ASCAP had executed the agreements, the Court entered an order approving them on April 15, 1969. On the morning of that hearing, plaintiff received a copy of a license agreement between ASCAP and NBC. An analysis of that agreement revealed that certain provisions of the draft of license agreement between plaintiff and ASCAP for the post-January 1, 1966, period discriminated against plaintiff in comparison with the license agreement between ASCAP and NBC, and plaintiff declined to execute the agreements until the discriminatory provisions were removed. Thereafter, ASCAP agreed to deletion of the discriminatory provisions, and, in December 1969, plaintiff and ASCAP

executed, as of January 1, 1966, complete license agreements which, among their other provisions, reconfirmed the "without prejudice" proviso of the January 1966 understanding. Thus, the 1962 proceeding became moot and was in appropriate posture for the entry of an order terminating it.

(c) Plaintiff therefore served and submitted to the Court for entry a proposed order terminating the 1962 proceeding. ASCAP, on the other hand, proposed an order which not only would have failed to terminate the proceeding but sought a declaration that the "license fees set forth in the agreements annexed hereto and the additional payments to satisfy claims of ASCAP for certain years as set forth therein are reasonable" and "the agreements comply with the terms of the Amended Final Judgment herein".

(d) On January 12, 1970, the Court settled and directed the entry of an order in the 1962 proceeding, which provided in pertinent part as follows:

> "The parties having agreed on payments for the past and on a basis of payment for the years through December 31, 1969, with the understanding that such basis of payment as expressed for the period January 1, 1966, through December 31, 1969, shall apply for those years only and shall not be binding upon or prejudicial to any position taken by either of the parties for years subsequent to the termination of the agreement, and this Court has been advised of the terms of the agreement reached.
>
> "The license fees set forth in the agreements annexed hereto and the additional payments to satisfy claims of ASCAP for certain years as set forth therein and the royalty rates fixed in the annexed agreement are accepted by the Court as a final determination in this proceeding."

Under Section IX of the ASCAP consent decree, the

only "final determination" which the Court is empowered to make is the determination of a "reasonable fee". Since the operative language of the order recites that the Court had accepted the "license fees", the "additional payments" and the "royalty rates" set forth in the agreements as "a final determination in this proceeding", it might have been susceptible to an interpretation that the Court had determined those fees, payments and rates to be reasonable. If given collateral estoppel effect, the order, as thus interpreted, could have accorded ASCAP the very advantage which the "without prejudice" language of the agreement withdrew.

(e) Plaintiff therefore moved to alter, amend or vacate that order, and, after a hearing on February 4, 1970, that motion was denied on February 5, 1970. As grounds for the motion, plaintiff argued that the District Court lacked jurisdiction under the consent decree or Article III of the United States Constitution to make any determination on the merits over a party's objection in a case that had been mooted by the parties' settlement agreement.

(f) During that hearing, the Court indicated that it would probably deny the motion. Plaintiff then moved under Fed. R. Civ. P. 54(b) for a determination that "there is no just reason for delay" and an order directing entry of final judgment dismissing the 1962 proceeding. That motion was denied from the bench.

(g) On February 11, 1970, plaintiff noticed an appeal to the Second Circuit Court of Appeals from

the orders entered January 12, 1970, and February 5, 1970, and on March 6, 1970, filed a petition for an extraordinary writ and a motion to consolidate that petition with its appeal. The petition for an extraordinary writ was filed in an attempt to assure appellate review of the orders appealed from in the event that the Court's denial of plaintiff's motion for entry of final judgment under Fed. R. Civ. P. 54(b) was held to preclude review of those orders on direct appeal.

(h) On April 1, 1970, ASCAP made a cross-motion to dismiss plaintiff's appeal.

(i) Prior to moving to alter, amend or vacate the order of January 12, 1970, counsel for plaintiff offered to take no further action with respect to that order if ASCAP would agree not to assert any res judicata or collateral estoppel effect arising from it. ASCAP rejected that offer, thus necessitating the motion to alter, amend, or vacate, the appeal and the petition for an extraordinary writ. However, on April 3, 1970, the business day next preceding the day set for oral argument in the Court of Appeals, ASCAP reversed its position and entered into an agreement with plaintiff which provided in relevant part:

> "ASCAP hereby waives any res judicata or collateral estoppel effect based upon or arising from the order of Hon. Sylvester J. Ryan entered January 12, 1970 (copy of which order is annexed hereto)."

Simultaneously with the execution of that agreement, plaintiff made full payment to ASCAP of all fees called

for by the license agreements executed in December 1969, as of January 1, 1966, and thereupon discontinued that appeal and petition.

21. States that it is without knowledge or information sufficient to form a belief as to the truth of the averments of the fifth sentence of paragraph 56(b).

22. Denies the averments of paragraph 56(c), except that on December 19, 1969, plaintiff delivered a letter to ASCAP, annexed to the complaint as Exhibit A, to which reference is made for the contents thereof.

23. Denies the averments of paragraph 56(d) except that on or about December 23, 1969, ASCAP delivered a letter to plaintiff, annexed to the complaint as Exhibit C, to which reference is made for the contents thereof, and that on December 31, 1969, plaintiff instituted this action by filing the complaint herein, to which reference is made for the contents thereof.

24. Denies the averments of paragraph 56(e), except states that, for the reasons, and on the grounds, set forth in paragraph 22 of the complaint, plaintiff, pursuant to Section IX of the ASCAP consent decree, has applied to ASCAP, for successive 60-day periods, for the right to use copyrighted music in the ASCAP pool and that this Court, by order dated August 10, 1970, granted plaintiff that right, until termination by either party, "without prejudice to any position which either party has taken or may seek to take in the future".

25. States that it is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 56(f), except refers to the NBC

papers specified therein, and filed in this Court, for the contents thereof.

26. Repeats its responses as set forth herein to each of the averments reaverred in paragraph 59.

27. Denies the averments of paragraph 60.

FOR A FIRST DEFENSE, AVERS:

28. The averments of paragraphs 4, 6, 9, 10, 11, 13, 14 (except the last sentence thereof), 15, 16, 18, 19, 20, 21, 22 and 23 of the complaint are reaverred.

29. Section V of the ASCAP consent decree directs ASCAP

> "to issue, upon request, licenses for rights of public performance of compositions in the ASCAP repertory . . . [t]o a radio broadcasting network [or] telecasting network . . . on terms which authorize the simultaneous and so-called 'delayed' performance by broadcasting or telecasting . . . of the ASCAP repertory by any, some or all of the stations in the United States affiliated with such radio network or television network . . . and do not require a separate license for each station . . . for such performances. . . ."

30. Since ASCAP refuses to grant performing rights licenses to the musical compositions in its pool except on the "blanket" or "per-program" terms set forth in Section IX of that decree, the counterclaims fail to present a justiciable case or controversy under Article III of the United States Constitution, and the Court therefore lacks subject matter jurisdiction over those claims.

FOR A SECOND DEFENSE, AVERS:

31. The averments of paragraphs 28 through 30 are reaverred.

32. Counterclaimants are estopped from asserting their claims, if any.

FOR A THIRD DEFENSE, AVERS:

33. Counterclaimants lack standing to assert their claims, if any.

FOR A FOURTH DEFENSE, AVERS:

34. Counterclaimants' claims, if any, are barred because of their laches.

FOR A FIFTH DEFENSE, AVERS:

35. Counterclaimants' claims, if any, are barred by the statute of limitations.

FOR A SIXTH DEFENSE, AVERS:

36. The FCC in a Report and Order styled, In the Matter of Amendment of Part 73 of the Commission's Rules and Regulations with Respect to Competition and Responsibility in Network Television Broadcasting, Docket No. 12782, adopted May 4, 1970, released May 7, 1970, as amended, has embarked upon a pervasive regulatory scheme regarding the amount of network programming which may be broadcast by television station licensees and the extent of the financial interests of television networks in such programming. In so doing, the Commission decided to keep the docket of the proceeding open so as to enable it to assess the effects of that regulatory scheme and to determine whether other proposals would better achieve the Commission's purpose. The relief sought by counterclaimants in paragraphs 4 and 7 of their prayers for relief would interfere with that regulatory scheme.

37. Plaintiff and others have taken appeals to the United States Court of Appeals of the Second Circuit

which challenge the Commission's jurisdiction to make that order. If it is ultimately determined that the Commission possesses such jurisdiction, this Court may not grant the relief sought by counterclaimants because the Commission would then have, and be in the process of exercising, its primary and continuing jurisdiction over the matters referred to therein.

FOR A SEVENTH DEFENSE, AVERS:

38. The relief sought by counterclaimants is barred by the First Amendment to the United States Constitution.

WHEREFORE, plaintiff demands judgment dismissing the counterclaims and for the relief demanded in plaintiff's complaint.

October 29, 1970.

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Of Counsel.

OFFICE COPY ENTERED

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

COLUMBIA BROADCASTING SYSTEM, INC., :

Plaintiff, :

-against- : 69 Civ. 5740

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al., :

Defendants. :

- -x

REPLY MEMORANDUM IN
SUPPORT OF BMI MOTION
FOR PRELIMINARY INJUNCTION

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

COLUMBIA BROADCASTING SYSTEM, INC.,

Plaintiff,

-against-

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al.,

Defendants.

69 Civ. 5740

- x

REPLY MEMORANDUM IN SUPPORT OF BMI MOTION FOR PRELIMINARY INJUNCTION

This reply memorandum is submitted in support of the motion of defendant Broadcast Music, Inc. ("BMI") and certain of its affiliates for a preliminary injunction requiring plaintiff Columbia Broadcasting System, Inc. ("CBS") either to pay BMI for the use of BMI music on CBS Television Network ("CBSTN") during the course of this suit, or to stop using such music.

PRELIMINARY STATEMENT

CBS has not disputed that BMI would be irreparably injured unless this Court grants it interim relief pending the final resolution of this action; indeed, it has itself suggested a form of interim relief. But CBS' own papers demonstrate the inadequacy of its proposal and go far towards establishing the appropriateness of BMI's formula.

Nowhere in CBS' voluminous pile of papers is there the slightest suggestion that CBS has not engaged in massive and wholesale infringements of the copyrights of BMI music.

Furthermore, CBS' claims as to the merits of its grab bag of antitrust defenses are not nearly so solid as its rhetoric suggests. Apparently newly aware that the Zenith-Hazeltine case when carefully read lends no support to its claim of a right to a per-use license, CBS has shifted its legal theory to place primary emphasis on allegations of unlawful tying. However, at all negotiations with BMI prior to and after it embarked on its program of massive infringements, CBS sought to

bargain for a license for the entire BMI repertory; it never suggested that there were any compositions in the repertory which it did not want to license from BMI. Indeed, CBS does not now identify any portion of the BMI pool which it contends is unwanted and thus "tied", and in its opposition papers still requests a license on all the musical compositions in the BMI repertory (Sipes Aff. ¶ 33*). CBS is thus in no position to complain of unlawful tying practices.

The insubstantiality of this and the other CBS asserted defenses, and the imminence of irreparable injury to BMI warrant the granting of BMI's motion.

ARGUMENT

BMI HAS FULLY SATISFIED ITS BURDEN OF ESTABLISHING ITS RIGHT TO PRELIMINARY RELIEF

It is familiar law that the two elements which a court must consider in deciding whether or not to grant a motion for a preliminary injunction are the comparative

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* References to "Sipes Aff. ¶ ___" are to the affidavit of CBSTN's Vice President of Business Affairs and Planning, sworn to July 7, 1970.

hardships to the parties and the strength of the moving party's case on the merits. When the moving party has shown the clear imminence of irreparable injury, his burden as to the merits becomes secondary. Thus, Judge Friendly observed only a few days ago that where "' the balance of hardships tips decidedly'" toward the moving party, the requirement to his preliminary showing on the merits is less rigorous. Semmes Motors, Inc. v. Ford Motor Company, Nos. 34447 and 34671 at 3664 (2d Cir. July 6, 1970), quoting Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 740 (2d Cir. 1953). In Semmes, the Court held that the harm to the plaintiff automobile dealer if injunctive relief against termination of his business were not granted would be much greater than the "relatively small" hardship to the defendant Ford Motor Company in continuing the plaintiff's dealership during the litigation under the injunction. Id. at 3664. Judge Friendly described the applicable test for preliminary injunctive relief as follows:

> "In light of the imbalance of hardship, affirmance * * * does not depend on a holding that Semmes had demonstrated a likelihood of success; it is necessary only that Semmes 'has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation,' Hamilton Watch Co. v. Benrus Watch Co., supra, 206 F.2d at 740." Id. at 3665.

As set forth below, BMI would suffer extreme hardship if injunctive relief were denied, while CBS would suffer very little harm if required to make the interim payments prayed for. And BMI's positions on the merits clear by a wide margin the hurdle that they be "a fair ground for litigation."

A. The Balance of Hardships Tips Decidedly In BMI's Favor

As set forth in greater detail in the Reply Affidavit of Edward Cramer, sworn to July 9, 1970, submitted herewith (hereinafter "Cramer Reply Aff. ¶ __"), BMI's need for immediate injunctive relief is widely recognized.

In suggesting its own plan for interim relief, CBS has implicitly recognized the hardship which is resulting to BMI under the present state of affairs. With no income being received from a major user of its music, BMI is less able than its only significant competitor to attract and to retain authors, composers and publishers. In these circumstances, in the short run the competitive balance between the licensing organizations will be destroyed, and in the long run ASCAP's competition will be eliminated.

The essential vice of the CBS proposal for interim relief is that it not only would not restore the competitive balance, it would further impair it for two principal reasons: (1) it would encourage CBS to commence boycotting BMI music, and (2) it would freeze BMI's income below its already artificially depressed level, thus increasing the inequitable disparity between payments to BMI and ASCAP.

Since January 1, 1970, CBS has been operating under a series of interim blanket licenses which it requested pursuant to the ASCAP consent decree. At some point - if, indeed, it has not already done so - CBS will in all probability pay for its use of ASCAP compositions on a blanket basis. On the other hand, CBS now proposes that it be required to pay BMI only for those BMI compositions actually used. Thus, CBS would be able to perform as much ASCAP music as it desired without incurring additional liability, while it would incur additional expense for each BMI composition performed. CBS would therefore be motivated to substitute ASCAP music for BMI music wherever possible and thus to boycott BMI music.

CBS' brief in opposition to this motion (p. 72) expressly recognizes the boycott potential in this situation. In complaining of alleged defects in a per-program license CBS states in its brief that:

> "* * * when BMI music must be paid for if used at all on a particular program - but paid for at the same fee irrespective of the amount of use - the broadcaster is impelled to satisfy as many as possible of his remaining music requirements for that program from the BMI pool and therefore give up competing substitutes (such as music owned by persons who are not members of BMI or of any other licensing society insisting on similar terms)."

Again, CBS argues in its brief (p. 43) that:

> "* * * once plaintiff must pay the same flat fee or percentage of its 'time income' (as those licenses require) for each year, or for each program using any BMI composition, plaintiff is dissuaded, as a practical matter, from fulfilling its music needs from sources other than the BMI pool (and the pools of other licensing societies which insist on the same terms)." (Footnote omitted.)

Thus CBS' own statements demonstrate sufficient reason why its proposal must be rejected.

Moreover, as set forth in greater detail in the Cramer Reply Affidavit, ¶¶ 18-22, CBS' proposal is based on a wholly simplistic and erroneous picture of the BMI payment system; BMI distributes income to its affiliates according to complex and often changing formulas which vary among types of music and provide myriad bonuses

based on competitive and economic conditions. Thus when CBS proposes to pay BMI according to BMI's minimum rate schedule, which does not even approach in amount or complexity the funds BMI actually distributes, it threatens to lessen even further BMI's ability to compete with ASCAP.

Furthermore, the CBS proposal fails to provide CBS with any relief from the conditions of which it complains. CBS contends that a per-program license would deprive it of all incentive to negotiate individually with BMI affiliates, but ignores the fact that the CBS interim proposal would do so as well. Under the proposal, CBS would pay BMI the amount BMI distributes to its affiliates plus a pro rata share of administrative expenses. In order to induce a BMI affiliate to license CBS directly it would presumably be necessary to pay the affiliate more than he would receive from BMI. Thus, CBS would necessarily be out of pocket if it engaged in any direct licensing during the pendency of this action. In sum, the CBS proposal not only fails adequately to protect BMI; it also fails to provide any compensatory advantage to CBS.

Even apart from CBS' ready recognition of BMI's plight in its proposal, the devastating effect which the present state of affairs is having on

BMI is obvious. Equivocal statements in the affidavit of Mr. Sipes notwithstanding, it is to be anticipated that CBS will shortly be paying ASCAP millions of dollars pursuant to blanket licenses while paying BMI nothing. Yet CBS has repeatedly stated that its antitrust claims against BMI and ASCAP are substantially identical (e.g., Sipes Aff. ¶ 38; mem. pp. 4, 47). The present motion seeks only to avoid the grossly disparate treatment which CBS is according to two organizations which it accuses of identical violations of law - treatment which is having and will have devastating effects. As the Cramer Reply Affidavit reveals, both the industry in general and CBS' principal competitor recognize that if BMI does not receive interim relief it may well be driven out of business. The portion of the Broadcasting editorial quoted in Mr. Cramer's affidavit (¶ 7, Exhibit 3) bears repetition:

> "* * * BMI's claim that its competitive ability is being threatened is the most pressing. Whether by negotiation or court procedure, BMI must be allowed to remain a viable competitor to ASCAP while the other questions are being decided. Otherwise it could win its case years after it went out of business. Whatever the outcome on the other issues, if BMI goes down the drain, ASCAP will have won what it has always sought - and more. * * *"

As compared to the threat to BMI's very existence, the harm to CBS under the preliminary injunction sought by BMI would be quite insubstantial. From the relief sought by CBS it does not appear that CBS actually contemplates the destruction of BMI. Thus, to the extent that BMI might ultimately be held not entitled to as much in copyright infringement damages as CBS may have paid to BMI during the litigation (but see BMI's prior memorandum herein pp. 38-40), CBS' interim payments can be credited against future license fees. CBS therefore would lose only the use of any excess money paid out in interim fees - a modest cost for the preservation of competition in music licensing during the pendency of this action.

B. BMI Is Likely To Succeed On The Merits

CBS has not advanced several new theories in addition to Zenith-Hazeltine in support of its claims of copyright misuse. None of them has merit.

1. The Alleged Tying Defense

CBS' argument that BMI is engaged in unlawful tying is ludicrous. CBS has never asked for and does not now ask for anything other than a license giving it the right to perform all of the compositions in the BMI

repertory (see Sipes Aff. ¶ 38). Thus, the necessary prerequisites to a tying argument, i.e., a desired "tying" product and an undesired "tied" product are not present. As the Supreme Court said in Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 614 (1953),

> "* * * The common core of the adjudicated unlawful tying arrangements is the forced purchase of a second distinct commodity with the desired purchase of a dominant 'tying' product, resulting in economic harm to competition in the 'tied' market."

CBS attempts to define the tied and tying music in terms of "accessible" and "inaccessible" compositions (Sipes Aff. ¶¶ 4-6). Under CBS' definition of accessibility, the same piece of music might be either accessible or inaccessible depending on how much in ~~advantage~~ advance of use CBS decided that it wished to use it. Surely no valid tying claim is advanced by one who cannot inform the licensor at the time the license is entered into exactly what it is that he claims is unwanted. Furthermore, the categories described by CBS as consisting of "accessible" and "inaccessible" music include no unwanted compositions: CBS desires to license from BMI compositions it describes as "accessible" as well as those it describes as "inaccessible" (Sipes Aff. ¶ 38). This is not changed by the fact that it may also wish to be licensed by BMI affiliates on "accessible" music. It is therefore meaningless to

describe them as "tied". It is turning the terminology of antitrust topsy-turvy to describe performance rights which CBS openly and eagerly seeks as being "tied".

What CBS is actually seeking is a license from BMI on all compositions in the repertory, which license would continue in effect with respect to each composition until such time as CBS struck a bargain for that composition with the BMI affiliates in interest, and under which royalty payments to BMI would be measured on a per-use basis. But this proposed plan of pursuing some individual licenses while continuing to license the bulk of its music needs from the BMI repertory appears to be utterly frivolous since it makes no economic sense. CBS cannot hope to persuade any BMI affiliate to license directly unless it proposes to pay more than BMI would; yet as against BMI, CBS cannot contend that by the loss of the affiliate the BMI repertory has lost value in any amount greater than the amount which BMI paid to that affiliate. Thus CBS seemingly wants to be able to bid against itself, a right which, if exercised, can only cost it money. The conclusion that CBS' position is frivolous is reinforced by its apparent failure to seek or obtain direct licenses from any BMI affiliate during the more than six months it has not had the blanket or per-program licenses from BMI, which licenses CBS contends provide the most significant deterrent to direct licensing (see Sipes Aff. ¶¶ 19-23).

Nothing in any decided antitrust case supports CBS' highly unusual claim of tying or its novel prayer for relief. In evaluating the strength of each party's case on the merits for the purposes of this motion, CBS' tying theory may appropriately be ignored.

2. Alleged Price-Fixing Defense

The cases cited by CBS in support of its charge of "price fixing" are not at all "squarely in point" as CBS claims (mem. p. 56), because in general the group licensing of patents or copyrights owned by more than one person does not necessarily involve price fixing, and because in particular the group licensing of musical public performance rights has been expressly viewed as a reasonable practice.

It has been settled since 1931 that the antitrust legality of pooling activities is to be tested in accordance with the rules of reason. Standard Oil Company (Indiana) v. United States, 283 U.S. 163 (1931).

When pools have been accused of unlawful pricing activities, one factor in favor of upholding them as within the rule of reason has been the existence of an alternative way of licensing the components of the pool. In Standard of Indiana, supra, the Supreme Court upheld a patent pool against Government charges that the effect of the pool was to maintain or increase royalty rates, on the ground that

the patent owners were free to issue licenses under their own patents or under the patents of all the others.

Also directly in point is the recent decision of the Court of Appeals for the Ninth Circuit in K-91, Inc. v. Gershwin Publishing Corp., 372 F.2d 1 (9th Cir. 1967), cert. denied, 389 U.S. 1045 (1968), in which it was held that the activities of ASCAP and its members did not constitute price fixing under the Sherman Act (372 F.2d at 4):

> "There is an additional reason why the activities disclosed by this record do not violate the antitrust laws. ASCAP's licensing authority is not exclusive. The right of the individual composer, author or publisher to make his own arrangements with prospective licensees, and the right of such prospective licensees to seek individual arrangements, are fully preserved."*

BMI fits squarely within the rule of Standard Oil of Indiana and K-91 since the BMI consent decree (IV(A)) permits broadcasters to request writers and publishers affiliated with BMI to issue individual direct licenses (see Cramer Reply Aff. Exhibit 6).

Thus the only remaining question is whether BMI

* The early ASCAP cases cited by CBS are not contrary to K-91. With the exception of M. Witmark & Sons v. Jensen, 80 F. Supp. 843 (D. Minn. 1948), appeal dismissed sub nom. M. Witmark & Sons v. Berger Amusement Co., 177 F.2d 515 (8th Cir. 1949), and Alden-Rochelle, Inc. v. ASCAP, 80 F. Supp. 888 (S.D.N.Y.), amended, 80 F. Supp. 900 (S.D.N.Y. 1948), those cases either were decided prior to the entry of any ASCAP consent decree or involved issues of state law. The Alden-Rochelle case involved an exclusive licensing scheme. Although the Witmark quotation in the CBS memorandum makes reference to a provision of the 1941 ASCAP consent decree appearing to create a direct licensing right, analysis of the terms of that provision discloses that the supposed right was almost wholly illusory. See United States v. ASCAP, CCH 1941 Trade Cas. ¶56,104 at ¶11(1) (S.D.N.Y. 1941). Compare the decree as amended after Witmark: United States v. ASCAP, CCH 1950 Trade Cas. ¶62,595 (S.D.N.Y. 1950).

meets the test of the rule of reason. It is clear that it does, for the United States Government itself has recognized that organizations licensing public performance rights of music in bulk come within the rule of reason.

In considering the question of whether or not to grant certiorari in the K-91 case, supra, the Supreme Court invited the Solicitor General to submit a brief amicus curiae (389 U.S. 805 (1967)). The brief submitted by Solicitor General Griswold in response to this request (annexed hereto as an Appendix) articulates with extraordinary clarity the reasonableness of music licensing pools:

> "The Sherman Act has always been discriminatingly applied in the light of economic realities. There are situations in which competitors have been permitted to form joint selling agencies or other pooled activities, subject to strict limitations under the antitrust laws to guarantee against abuse of the collective power thus created. * * * This case appears to us to involve such a situation. The extraordinary number of users spread across the land, the ease with which a performance may be broadcast, the sheer volume of copyrighted compositions, the enormous quantity of separate performances each year, the impracticability of negotiating individual licenses for each composition, and the ephemeral nature of each performance all combine to create unique market conditions for performance rights to recorded music.
>
> "If this market is to function at all, there must be - at least with respect to licensing the performance of recorded music - some kind of

> central licensing agency by which copyright holders may offer their works in a common pool to all who wish to use them. * * * There is simply no escaping, as a practical matter, the licensing of the works in bulk. Although bulk licensing must thus be tolerated, the opportunity to make separate arrangements directly with the individual copyright holder should also be preserved for those who might be able to take advantage of it.* * *
>
> "Petitioner maintains that individual arrangements are simply not practical * * *. We agree that in most, if not all, instances this is true.[8] But this simply reinforces the justification for a blanket licensing system. * * *" Memorandum for the United States as Amicus Curiae at 10-11, K-91, Inc. v. Gershwin Publishing Corp., cert. denied, 389 U.S. 1045 (1966).

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[8] Broadcasters with special needs may find it feasible to deal directly with publishers. "

Like the petitioner in K-91, CBS maintains here that dealing with the individual writers and publishers is wholly impracticable (Complaint ¶ 15; Reply ¶ 22). The Solicitor General's response in K-91 is equally applicable here:

> "* * * this simply reinforces the justification for a blanket licensing system." (p. 11)

Thus CBS' own admissions and the controlling authority demonstrate that BMI is within the rule of reason, and that CBS' "price fixing" defense is without merit.

3. The Alleged Exclusive Dealing and Boycott Defenses

CBS has not offered a shred of evidence that any BMI affiliate has refused direct dealings with CBS, or indeed, that CBS has even sought such dealings.

To the extent that the claims of boycott may be based on BMI's failure to propose per-use terms after CBS commenced its program of massive infringements they are specious. In light of CBS' willful and deliberate unlawful copyright infringements, BMI is under no obligation to deal with CBS, let alone to make overtures to it. See Technical Tape Corp. v. Minnesota Mining & Manufacturing Co., 247 F.2d 343 (2d Cir. 1957), cert. denied, 355 U.S. 952 (1958), a case in many ways similar to this one. There, plaintiff sued for a declaration of patent invalidity, and defendant counterclaimed for infringement. Plaintiff then raised a misuse defense on the ground that defendant had terminated six distributors who were dealing in plaintiff's infringing products after notice by defendant of infringement. The court rejected plaintiff's misuse defense:

> "A manufacturer has the right to stop dealing with a distributor or jobber who is acting unfairly towards his product or is trying to undermine his trade." 247 F.2d at 358.

4. The Alleged Zenith-Hazeltine Defense

CBS' contentions under Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969) which once was the basis stated for CBS' request for a per-use license (see December 19, 1969 letter, Complaint Exhibit A), fail to establish a defense to BMI's copyright counterclaims.

The holding of Zenith-Hazeltine is that the licensor of a patent pool may not insist on a royalty including a percentage of sales of items not utilizing any of the patents. Nothing in the court's opinion suggests that a licensor cannot demand a percentage of the sales of all products which do embody the patented device. In the context of the Zenith case, then, Hazeltine could lawfully have required Zenith to pay as a royalty a percentage of its sales of any television sets embodying one or more Hazeltine patents. In the context of this case, therefore, BMI may lawfully require CBS to pay as a royalty a percentage of its time sales on programs embodying one or more BMI compositions - in other words, a per program license.

Thus, what BMI offered CBS in response to CBS' request was precisely what Zenith-Hazeltine approved. CBS' request is not satisfied with a Zenith-approved license, but would ask for more. CBS argues, for example,

that its time sales command a price which depends upon a number of factors, only one of which is the music performed, and that therefore on occasion a particular percentage payment may reflect earnings from another source, such as the popularity of the star of the show (Sipes Aff. ¶ 23). But so also a particular line of television sets may command a higher price because of a shiny cabinet. If this factor were controlling for antitrust or misuse purposes, it would require, as Justice Harlan points out in his dissent in Zenith-Hazeltine, that percentage of sales royalties be "entirely outlawed" (395 U.S. at 145 (dissenting opinion)). And it is clear that the majority in Zenith-Hazeltine took no such step.

In any event, BMI has never insisted that CBS pay a royalty on the basis of a percentage of sales; BMI has been and remains willing to license CBS on a lump sum basis as it is permitted to do under its consent decree (Cramer Reply Aff. ¶¶ 11-12). Since the Zenith case proscribes only that which BMI has not done, its inapplicability is manifest. Although BMI pointed out this fact in its main brief (p. 30), CBS has not responded to it. Apparently it has no answer.

CONCLUSION

For the foregoing reasons, the motion on behalf of BMI and certain of its affiliates for preliminary

relief should be granted.

Dated: New York, New York
July 9, 1970

Respectfully submitted,

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No 147

In the Supreme Court of the United States

OCTOBER TERM, 1967

K-91, INC., PETITIONER

v.

GERSHWIN PUBLISHING CORPORATION, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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In the Supreme Court of the United States

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No. 147

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GERSHWIN PUBLISHING CORPORATION, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

On October 9, 1967, this Court invited the Solicitor General to express the views of the United States on this case. This memorandum is filed in response to that request.

STATEMENT

This is an action for infringement of the copyrights on some 183 recorded musical compositions (F6).[1] Respondents, the owners of the copyrights, sued petitioner, a corporation operating radio station KIXI in Seattle, Washington. In 1961 and 1962, that station gave public performances for profit of the compositions by broadcasting recordings of them without pay-

[1] "F" refers to the Findings of Fact made by the District Court.

ing any royalties and without the owners' consent (F2, 3, 4, 6, 7).[2] Some of the defendant radio stations have been engaged in such a practice for at least 10 years (F8).

Petitioner admitted the infringement of the copyrights, but defended on the ground that respondents could not maintain their suit because, as members of the American Society of Composers, Authors and Publishers ("ASCAP") they had formed an unlawful conspiracy in violation of the antitrust laws[3] which was engaged in price-fixing and block-booking of its members' works (Pet. App. 5, 13). It counterclaimed, seeking treble damages and an injunction against further renewal of the copyright (Pet. App. 14).

ASCAP is an unincorporated membership association of some 8,000 authors, composers, and publishers who own copyrights in various separate musical compositions (F16). It licenses these works for nondramatic public performances (F18). ASCAP's musical repertory, which is constantly changing as new copyrights are added and old copyrights expire (F23), includes more than one million works (Pet. App. 6).

Each respondent in the instant case has granted ASCAP the non-exclusive right to license its works

[2] Suits were also filed against two other Washington corporations operating radio stations and an individual officer of one of them. However, these defendants did not appeal from the district court's adverse ruling.

[3] Petitioner also asserted that respondents had violated laws of the State of Washington governing copyright protection (Chapter 19.24 R.C.W.), and were barred from relief by the "unclean hands" doctrine because they had unlawfully extended their individual copyright monopoly. Neither of those issues is presented in the petition for certiorari.

for non-dramatic public performances for profit (F21). This licensing activity is regulated and controlled by a consent decree entered in *United States* v. *ASCAP*, S.D.N.Y., Civ. No. 13-95 [4] (Br. in Opp. App. 1a–17a). As pertinent here, the decree requires ASCAP to "grant any user making written application therefor a non-exclusive license to perform all of the compositions in the ASCAP repertory" (Par. VI). However, the decree forbids ASCAP from granting "to any user a license to perform one or more specified compositions in the ASCAP repertory, unless both the user and member * * * shall have requested ASCAP in writing so to do * * *" or the composer cannot be located within 30 days (Par. VI). Upon receipt of an application for a license, ASCAP is required to "advise the applicant in writing of the fee which it deems reasonable for the license requested." ASCAP must avoid discrimination in fees (Par. VIII), and must offer comparable fees to all applicants similarly situated (Par. IX(C)). If the parties are unable to agree upon a mutually acceptable fee within 60 days of the filing of the application, the applicant "may forthwith apply [to the District Court for the Southern District of New York] for the determination of a reasonable fee * * *" (Par. IX). In such a proceeding ASCAP has the burden of establishing that the fee it seeks to charge is reasonable (Par. IX).

In addition, the 1950 consent decree forbids ASCAP from charging license fees for commercial programs which are based upon a percentage of

[4] CCH Trade Cases, 1950–1951, ¶ 62,595.

income from programs not including ASCAP compositions, unless the broadcaster desires such a license (Par. VII(A)). It also requires ASCAP to offer per program licenses for commercial programs for a flat fee or for a percentage of revenue from the program in which ASCAP music is played (Par. VII(B)). ASCAP must offer "a genuine economic choice between per program and blanket licenses" to stations with relatively few commercial announcements, and is restrained from influencing the licensee to negotiate for blanket licenses prior to negotiating a per program license (Par. VII (B) and (C)).

For radio stations located in the State of Washington a special arrangement under the decree was established in a consent order.[5] The order provides for two types of licenses: A blanket radio license and a per program radio license. Both licenses grant the licensee the right to perform any composition in the ASCAP repertory. The blanket license fee is 2.125 percent of the licensee's overall revenues from sale of time on the air, after certain deductions. The per program license fee is 8 percent of the gross revenues derived from the particular programs in which ASCAP compositions are performed (F38–45; Pet. 8).

Petitioner has never applied for either form of license; nor has it ever sought any other kind of license (F48). Since ASCAP's licenses are non-exclusive, respondents also have the right individually to

[5] This order resulted from differences between ASCAP and certain Washington broadcasters concerning the effect of a Washington State statute, R.C.W. 19.24, which makes it unlawful for combinations of copyright holders to issue licenses in the State of Washington for the right of public performance of their copyrighted works, except on a per piece basis (see Br. in Opp. 11–15; F38–45).

license their works on any basis, per piece or otherwise, which is mutually agreeable to applicants and themselves. Petitioner has never attempted to obtain such a license (F50–51).

The parties stipulated that it would be virtually impossible for broadcasters and copyright holders to arrange separate licenses and payments for each performance on radio of a copyrighted composition (R. 30, Agreed Fact 50). And the district court found that a central licensing agency such as ASCAP is the only practical way that copyright proprietors may enjoy their rights under the federal copyright laws and that broadcasters and others may conveniently obtain licenses for the performance of copyrighted music (F25). It found that single copyright owners cannot deal individually with all users or individually police the use of their songs (F25); and that a single radio station may broadcast as many as 60,000 performances of recorded musical compositions per year involving as many as 6,000 separate compositions (F11–12).

The district court concluded that the defendant radio stations had infringed the respondents' copyrights and that petitioner's defenses and counterclaims under the antitrust laws were without merit (Conclusions of Law 2, 15).[6] On appeal by petitioner, the Court of Appeals for the Ninth Circuit affirmed (Pet. App. 26, 27). The court held that no issue was presented as to whether the decree immunized ASCAP from further prosecution for violation of the antitrust laws. It determined, however, that ASCAP

[6] Petitioners and ASCAP have entered into a retroactive license agreement which as extended runs from January 1, 1959, to December 31, 1967 (Br. in Opp. 15).

was not a combination in restraint of trade or a monopoly within the meaning of the Sherman Act. Noting that when an applicant claims that ASCAP's fee is unreasonable, the court which entered the consent decree can be asked to fix the fee, the Ninth Circuit concluded that ASCAP cannot fix prices because "so long as ASCAP complies with the decree, it is not the price fixing authority," and indicated its disagreement with the view "that the danger of unreasonable activity that might arise from ASCAP's activities makes everything that it does a violation of the antitrust laws, when those of its potential activities that might have this effect are prohibited by the decree" (Pet. App. 18). In addition, the court concluded that because ASCAP's licensing authority is not exclusive and prospective licensees may therefore seek individual arrangements with individual composers, the activities disclosed by the record did not violate the antitrust laws (Pet. App. 19).

DISCUSSION

In substance, the question presented by the present petition is whether the bulk-licensing methods by which ASCAP's members market rights to perform publicly for profit recordings of their copyrighted musical compositions violate the antitrust laws. The court of appeals concluded that no antitrust violations were shown, after finding "that as a potential combination in restraint of trade, ASCAP has been 'disinfected' by the decree" (Pet. App. 18), and pointing out that music users may make individual arrangements with separate copyright holders if they

wish, instead of dealing with them through ASCAP. In the limited context of this case—the licensing of performance rights for broadcast by radio of recorded compositions—the result below, in our view, seems correct, and review by this Court would not appear to be warranted.

We do not understand the court below to have held that the consent decree now in force against ASCAP of itself makes lawful what would otherwise be unlawful (see Pet. App. 17–18). To the extent that ASCAP's activities, whether under the consent decree or unregulated, violate the antitrust laws, both the United States and private parties have a continuing remedy under the Sherman Act. Nothing in the holding below is to the contrary.

The existence and operation of agencies which collectively license the right to perform musical works raise difficult problems under the antitrust laws. See, *e.g., Alden-Rochelle, Inc.* v. *ASCAP,* 80 F. Supp. 888 (S.D.N.Y.); *M. Witmark & Sons* v. *Jensen,* 80 F. Supp. 843 (D. Minn.); *Affiliated Music Enterprises* v. *SESAC Inc.,* 60 F. Supp. 865, 875 (S.D.N.Y.). Since the musical works of copyright holders compete with each other, a combination of these holders through use of a common selling agency is subject to charges of illegal pooling and price-fixing. But the Sherman Act does not affect all situations in the same way. Thus, even though the antitrust laws apply with full force and effect to collective licensing agencies such as ASCAP, account must be taken of the

relevant economic setting—here, the relationship between the business of recorded music and commercial broadcasting.

The sale of the right publicly to perform for profit a copyrighted musical work, through the playing of a record of the composition, is not wholly comparable to the sale of a manufactured product or the sale of a license to make, use or vend a patented product. Compare *Bobbs-Merrill Co.* v. *Straus,* 210 U.S. 339, with *Buck* v. *Jewell-LaSalle Realty Co.,* 283 U.S. 191, 197. Broadcast of a recorded song over the radio is an intangible, audible event of a few minutes' duration. The resulting public "performance" for profit is not an alienable object like a copyrighted film or the phonograph record itself. The "performance" cannot be owned or transferred; it occurs only while the recording is being played over the air. Each playing is a separate performance subject to the copyright holders' control over performing rights. Congress has made that right wholly separate from the right to reproduce and sell recordings of the copyrighted work (17 U.S.C. 1(e)).

The exclusive right to make (*i.e.,* copy) and vend copyrighted works is analogous to the right to make and vend patented products, and the same antitrust considerations have been applied to abuses of these exclusive rights as are applied to patent rights. *United States* v. *Loew's Inc.,* 371 U.S. 38; *United States* v. *Paramount Pictures,* 334 U.S. 131. However, whatever the legality of a combination of copyright holders to pool and jointly sell these incidents of their copyrights, performing rights for recorded

music are, for obvious practical reasons, subject to somewhat different considerations.

The market for the evanescent right to broadcast a piece of recorded music is completely unlike the market for the right to perform the music in a commercial film's sound-track. Cf. *Alden-Rochelle, supra,* and *Witmark, supra.* Recordings are available everywhere to everyone, without distinction between home and commercial users, and the copyright holders have no voice in their sale. Once the holder has agreed to a recording of his work, it may be recorded by any company upon the giving of appropriate notice subject to the payment of the royalty of two cents per record (17 U.S.C. 1(e)). There are over 4,100 AM and 1,744 FM broadcasting stations located in every part of the United States (FCC Ann. Rep., pp. 106, 110 (1966)). Most of these stations broadcast recorded music for a substantial part of their operating day. They may acquire ownership of any recording they wish, and in the present state of technology there appears to be no effective means by which the enormous number of separate performances broadcast each year by commercial stations across the nation can be accounted for by copyright holders. Nor is it feasible for these stations to deal on a "per piece" basis with the thousands of individual copyright holders across the country in order lawfully to exploit recorded music, for the value of the right to broadcast a single performance of one recorded composition is far less than the cost of negotiating a separate license. It would appear, therefore, that there must be some form of centralized licensing system which serves the

mutual interests of copyright holders and of music users, and which enables the marketing of performing rights for recorded music to be effectively accomplished.

The Sherman Act has always been discriminatingly applied in the light of economic realities. There are situations in which competitors have been permitted to form joint selling agencies or other pooled activities, subject to strict limitations under the antitrust laws to guarantee against abuse of the collective power thus created. *Associated Press* v. *United States*, 326 U.S. 1; *United States* v. *St. Louis Terminal*, 224 U.S. 383; *Appalachian Coals, Inc.* v. *United States*, 288 U.S. 344; *Chicago Board of Trade* v. *United States*, 246 U.S. 231. This case appears to us to involve such a situation. The extraordinary number of users spread across the land, the ease with which a performance may be broadcast, the sheer volume of copyrighted compositions, the enormous quantity of separate performances each year,[7] the impracticability of negotiating individual licenses for each composition, and the ephemeral nature of each performance all combine to create unique market conditions for performance rights to recorded music.

If this market is to function at all, there must be—at least with respect to licensing the performance of recorded music—some kind of central licensing agency by which copyright holders may offer their

[7] Individual stations broadcast thousands of playings of musical compositions each year, and ASCAP has in excess of one million musical compositions in its repertory at any one time (see Pet. App. 6).

works in a common pool to all who wish to use them. ASCAP's repertory includes a large percentage of the nation's copyrighted music. This results in a situation which can lead to abusive discriminations among users, if not effectively regulated. Thus, it is quite reasonable to require ASCAP to offer the same terms to all users similarly situated. And because users' requirements for separate pieces are continuous, the volume of demand enormous, and the value of each single performance small, separate negotiations on a per piece basis are not practicable. There is simply no escaping, as a practical matter, the licensing of the works in bulk. Although bulk licensing must thus be tolerated, the opportunity to make separate arrangements directly with the individual copyright holder should also be preserved for those who might be able to take advantage of it. Therefore, the right to license in bulk delegated to the collective agency must be nonexclusive, so that users have the option of choosing a blanket license or negotiating with individual copyright holders. Cf. *United States* v. *Paramount Pictures*, 334 U.S. 131, 159. These are, of course, some of the central terms of the government's present consent decree against ASCAP.

Petitioner maintains that individual arrangements are simply not practical (Pet. 17). We agree that in most, if not all, instances this is true.[3] But this simply reinforces the justification for a blanket licensing system. Indeed, petitioner seems to suggest

[3] Broadcasters with special needs may find it feasible to deal directly with publishers.

that ASCAP might constitute a lawful arrangement if it offered a greater variety of license packages, for example, western, religious, rock, classical, etc. (Pet. 7). Thus, petitioner concedes that the issue is not the validity of ASCAP's existence in the field of licensing recorded music, or the legitimacy of its bulk licensing as such in this field, but rather the size of the package ASCAP offers.

Alternatively, petitioner argues that its objections might be avoided if ASCAP were required to negotiate licenses with recording companies so that the performance rights would be sold at the source, *i.e.*, anyone acquiring ownership of the record would also own the right to perform it publicly for profit.[9] But there is nothing in the record to indicate that recording companies have ever sought such rights, that they have any economic incentive to do so, or that ASCAP has ever attempted to prevent them from obtaining such licenses. The reasons for this readily suggest themselves. Such companies earn their income from the sale of recordings, not from the public performance of the recording for profit. Moreover, the value of the performing right for a single song

[9] Such an arrangement has been adopted under the ASCAP decree with respect to the performance of music incorporated into the sound track of motion pictures distributed to movie exhibitors. Prior to 1948 ASCAP required exhibitors to obtain a license from it in order to play the music on the sound track of films they had rented. The 1950 amendment to the decree forbade this, thus requiring ASCAP to negotiate with the motion picture producers a license for public performance of the music which would operate to the benefit of anyone renting the film. See Timberg, *The Antitrust Aspects of Merchandising Modern Music*, 19 Law & Contemp. Prob. 294 (1954).

cannot be determined until it has been exposed to the public and the extent of demand for its playing can be assessed. Finally, since the same record may be used at home or in the broadcast studio, the price of the performing right would be reflected in the price of the record sold to the general public, thus requiring the record-buying public to subsidize the operating costs of radio stations which broadcast the musical compositions.

If the record here furnished any substantial basis for concluding that practical alternatives exist to bulk licensing of recorded music, a different case would be presented. We do not suggest that a private litigant has the burden of conclusively establishing the feasibility of such alternatives. Rather, in the light of the stipulated facts which show the practical need for bulk licensing in order for the market to function (see *supra,* p. 5), petitioner should at least have come forward with evidence demonstrating a reasonable possibility that alternative methods are feasible. That has not been done.

There is no question, of course, that the combination of copyright holders which ASCAP represents requires the closest scrutiny under the antitrust laws. Collective activity necessary for a market to function must go no further than absolutely necessary. For it is only the preservation of the market, not the protection of the copyright privilege, which justifies the combination (cf. *Watson* v. *Buck,* 313 U.S. 387, 404), and it is only for that purpose that the combination is tolerated. Because of the competitive threat represented by ASCAP, the United States sued it under

the Sherman Act in 1941 and obtained a consent decree against it. As conditions change [10] or abuses are disclosed, it may become necessary, as in 1950 (see, pp. 3–4, *supra*), for the government to seek modifications of that decree or to file suit for additional relief.

Private parties, of course, always have the option of seeking relief in their own behalf, nothwithstanding any consent decree accepted by the government. We believe, however, that nothing has been shown on this record to warrant a finding that the antitrust laws have been violated. Accordingly, the court below appears to have reached the correct result."

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

DONALD F. TURNER,
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HOWARD E. SHAPIRO,
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DECEMBER 1967.

[10] For example, the difficult problem of accounting for millions of separate performances each year may ultimately be solved by developments in computer technology. Such a change might warrant a completely new approach to the operation of the market for performance rights to recorded music.

[11] What we say here applies only to the record in this case. Other ASCAP licensing activities are not involved and we take no position concerning them.

U.S. GOVERNMENT PRINTING OFFICE: 1967

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

COLUMBIA BROADCASTING SYSTEM, INC.,

Plaintiff,

vs.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS and PUBLISHERS, et al.,

Defendants.

69 Civ. 5740

Before: HON. MORRIS E. LASKER, D.J.

New York, July 10, 1970;
10.30 A.M.

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- - -

THE CLERK: CBS v ASCAP and BMI.

Plaintiff's ready?

THE COURT: The moving party is ready?

MR. SHAPIRO: Yes, your Honor, we are ready.

THE CLERK: And others ready?

MR. HRUSKA: Yes.

MR. SHAPIRO: If your Honor please, this is an action which has been brought by CBS against ASCAP and its members and against BMI and its affiliates. Essentially CBS seeks declaratory and injunctive relief, claiming violations of the anti-trust laws of different kinds which CBS claims amout to copyright misuse.

BMI has counterclaimed here for massive copyright infringement in a magniture of 38,000 infringing performances a week, and there appears on the papers here, your Honor, to be no issue that this infringement is taking place.

THE COURT: How does the infringment alleged in the counterclaims here compare with the infringement suits that you have brought? Some of the questions I will ask during the course of today's discussion will be to give me a total background about this.

MR. SHAPIRO: Well, your Honor, there were, I think, 44 actual infringing compositions that are

alleged to have been infringed here, and I am not sure of the arithmetic.

THE COURT: I didn't really mean in terms of arithmetic. Is there any difference in theory and how is it that some are alleged in this counterclaim and others are in other places, is it because they were broadcast in other places or what?

MR. SHAPIRO: Yes, your Honor, there are suits alleged in different geographical areas against local infringements, but the basic infringement by CBS as a network is all in this case.

THE COURT: In this case?

MR. SHAPIRO: Yes, your Honor.

THE COURT: Thank you.

MR. SHAPIRO: Now, your Honor, there is one striking similarity in this case and one striking dissimilarity. The striking similarity is in the kinds of conduct that are alleged against ASCAP and CBS -- against ASCAP and BMI. There is an identity of conduct which CBS alleges to be in violation of the anti-trust laws and to constitute copyright misuse.

The striking dissimilarity is in the way CBS proposes to handle payments to ASCAP and BMI during the course of what CBS has said is likely to be a very protracted

litigation, and I think from the volume of papers before your Honor today on this motion that appears to be likely.

What CBS has done with respect to ASCAP, according to Mr. Finkelstein's supplemental affidavit that was just served yesterday, is to have been accepting 60 days licenses from ASCAP and has made application before Judge Ryan in United States v ASCAP for an interim fee.

These are blanket licenses your Honor, these are blanket licenses.

THE COURT: Yes.

MR. SHAPIRO: And CBS has said in the proceedings before Judge Ryan in United States v ASCAP, two things:

One, that a payment in excess of $4 million for this blanket license on an interim basis would not penalize CBS, and the other, that a payment in excess of $4 million, as an interim fee for a blanket license in those proceedings, would have the virtue of simplicity.

Now that, your HOnor, is to be contrasted with CBS' proposal for dealing with BMI on their own basis, and the perniciousness of that proposal I would like to deal with a little bit later on.

Basically, the motion before the Court today is for a preliminay injuction which would have as its objective to enable the survival of BMI as a competitor of

ASCAP during the course of the litigation.

THE COURT: May I ask you this:

Is there not now a similar case pending by NBC against ASCAP and BMI, similar to this one?

MR.SHAPIRO: There is not, your Honor.

THE COURT: I will have to ask either all counsel or one counsel to assume responsibility within the next few days of giving me a memorandum of the various cases that are pending among the various parties, their subject matter and their relationship, because I think to try to decide some of the issues here without that knowledge would be very unintelligent.

MR. SHAPIRO: We will undertake to do that, your Honor.

THE COURT: Then I won't ask further questions about that. You can refer to those further cases to the extent you believe them to be relevant.

MR. SHAPIRO: Thank you, your Honor.

BMI's application here is for preliminary relief in the alternative.

BMI wishes a mandatory injunction which will require CBS to pay pendente lite to BMI 70 percent of what it pays to ASCAP for to stop infringing, a prohibitory injunction preventing infringement.

The basis for the relief sought by BMI, your Honor, is a classical equitable basis, to prevent irreperable injury. That kind of relief is rooted in equitable tradition, and there would appear here to be no difference between the parties as to your Honor's power to grant it.

Indeed, CBS simply asks for a different kind of mandatory injunction.

THE COURT: They go a little farther than that and say that although I may have the power you don't deserve any relief, but they do say that they don't want to be that nasty about it.

MR. SHAPIRO: Your Honor, we propose to address ourselves to that precise question as to whether we deserve the relief.

THE COURT: Sure.

MR. SHAPIRO: The basis, your Honor, in broad terms is that irreparable injury will occur if relief is not granted and no comparable harm to anyone will occur if the relief we seek is granted.

BMI's case, your Honor, for equitable relief is stronger than most of the cases in which courts have exercised equitable power in contexts such as this.

Here it is not just irreparable injury that we say is probable, in fact, certain, but the actual

destruction of the enterprise, and not only that, but we intend to show, and do show that not only is there irreparable injury to BMI and probable destruction of its enterprise inherent in denial of relief but also a deprivation to the public interest in the area of its interest in competition.

In broad terms, your Honor, BMI is seeking injunctive relief pendente lite having as its objective, and with a mechanical basis for achieving that objective, of survival in the course of the litigation.

CBS opposes this on the basis of an erroneous, which we hope to be able to persuade your Honor is an erroneous and simplistic approach to the Zenith against Hazeltine case which I would like to analyze in greater detail in a few minutes.

But before doing that, your Honor, I think it important for perspective to have some background facts as to the industry and the context in which this motion comes up.

THE COURT: I'd be very much interested. I have spotty knowledge of the history of BMI's formation, the fact that it was originally formed by broadcasters, but apparently has at least some different family relations now and I'd like to know the background.

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MR. SHAPIRO: Yes, your Honor.

BMI is currently one of two companies in an industry. The industry is essentially that of licensing musical compositions for profit and for public performance, and obtaining a royalty for those licenses, and the licenses of course involve copyrighted musical compositions. These are musical compositions which are composed, authored, published by members of ASCAP or by affiliates of BMI.

The market structure, as I indicated, is basically a duopolistic market structure. It is very small compared to the other two. I would say, essentially, it is a duopoly.

But, your Honor, ironically, paradoxically, the duopoly does not occur as the result of a shrinkage or concentration of market power but rather a defusion or expansion of market power.

ASCAP formerly had a monopoly, and when it had its monopoly it exercised the monopoly to the extreme disadvantage of the broadcasting industry to the point where the broadcasting industry in self defense formed BMI as an independent unit to compete against ASCAP in its licensing.

There was a period, your HOnor, I believe it was in the thirties, when the broadcast industry did

not have a license from ASCAP, couldn't play ASCAP music, and the first thing that BMI had to do was to get a bunch of arrangers into a room to arrange old songs in the public domain so they would have some music to play,and that is what Jeanie With The Light Brown Hair is all about.

Now, your Honor, there are approximately 16,000 members of ASCAP and approximately 28,000 affiliates of BMI. BMI is a non-profit organization which, except for the retention of prudent reserves, distributes all of its income to these 28,000 affiliates.

ASCAP, of course, makes comparable payments to its members.

The money which is obtained from licensing musical compositions by ASCAP and BMI is the life blood of the industry, because it's a cricular thing. If you have money and the expectation of money, you can attract important affiliates or members, as the case may be. If you don't have the money, you can't continue your relationship with them, and you can't develop new relationships.

So money really, your Honor, is the name of the game, and I invite your Honor's attention to a graphic illustration of that; the Exhibit A to the Kramer affidavit, which is the original affidavit in support of BMI's motion.

THE COURT: Yes, I have seen it. I read that

with great interest, more do re mi.

MR. SHAPIRO: Yes, more do re mi. It's a great pun, but it's very significant, and there is not only the more do re mi theme, your Honor, but down at the bottom, at ASCAP, every good boy does finer, and thereis only one licensing organization that they are talking about being finer than, and then they don't even make bones about that but they say, we will pay you more per performance than BMI.

This is real competition, and it's obvious that money is the game.

Now, in a game where money is the commodity, it's a little unusual, it's a different kind of industry from most. Here money is really the commodity that makes the industry run, and therefore,your Honor, if there is a disproportion in the amount of money available to either of these two competitors in this duopolistic market, there must be a deterioration in the other to the point of extinction.

One of the large sources of money, your Honor, is licensing of broadcasting television networks, and CBS, of course, is the main one.

For a period of over 15 years from at least 1954, there was a regular course of conduct between CBS and ASCAP on the one hand, and between CBS and BMI on the

other hand.

There was a license, a blanket license, with each of those two licensing organizations, in which CBS paid to ASCAP 2.5 percent of its total income, net income from advertisers less deductions, and paid BMI 1.09 percent of comparable amounts.

This amounted to 43.6 percent as a ratio, BMI's income was 43.6 percent as much as ASCAP's was for use of music.

In 1969 --

THE COURT: Tell me, I know that that is what it turned out to be, but you are not suggesting that previous agreements were neglected on a comparative basis, are you?

MR. SHAPIRO: Well, your Honor, --

THE COURT: Or are you?

MR. SHAPIRO: No, I am not. This was continued year after year, even though there had been a creeping increase of the ratio of BMI music to ASCAP music which was not reflected in the amounts that were being paid.

THE COURT: Without indicating, and I have no attitude at all as to the propriety of your present suggestion of 70 percent or even the principle of comparativeness, can you give me some background as to how the 1.09 figure was reached in the past? Or the other

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figure?

MR. SHAPIRO: Your Honor, I am not able to do that. It's historical. It is not involved in the present motion. If your Honor would like to have a short memorandum on that subject, we would be glad to provide that.

THE COURT: It may be unimportant, I don't know. But some day I'd like to know the whole history.

MR.SHAPIRO: Yes, your Honor. In 1969, CBS papers, Mr. Sipes' affidavits indicate that the ratio on CBS figures were 60 percent, 60 percent BMI to ASCAP ratio.

In that year CBS agreed to pay ASCAP, and did pay ASCAP $5,680,000 flat sum for the year and paid or agreed to pay no more to BMI than 1.3 million.

Now, that is less than 23 percent, and I represent to your Honor that the 60 percent figure in 1969 was a higher ratio than there had been in the past while that 43.6 percent ratio was in effect.

Well, this being a a business in which negotiation is appropriate, your Honor -- there is no question but that there is competition, and the two licensing organizations are perfectly free to negotiate with the networks on the value of the licensing arrangement -- BMI entered into negotiations with CBS seeking to have a rate arranged

for 1970, and these negotiations were completely aborted.

There were meetings, and nothing happened. And finally, at the end of October, BMI served on CBS a notice, as it had the right and indeed the obligation to do if it was to end the license, that as of January 1, 1970, the license would no longer be in effect, and warning CBS that thereafter infringement would be, of course, deliberate

After the notice of termination, there was yet another meeting which again was aborted, and finally on December 19th came CBS's letter, which is annexed as Exhibit A to the complaint, in which it made its demand for what they call and what we can call here a per use license.

Now, your Honor, may I take a moment to say what a per use license is as explained in the December 19th letter.

A per use license, according to CBS, is a license in which each actual use of music would give rise to the obligation to pay royalty which would be measured by the particular nature of the use. The character of the use would determine the amount of royalty, and there would be no royalty unless there were a use, and that is a per use license.

Now, your Honor, the December 19th letter,

that was the point that they were making in terms of payment: How do you pay for it? They were not talking about the content of the package. They were not talking about the size of the package. They were talking about a method of payment for the license package.

THE COURT: Was this the first time that CBS had proposed a per use license?

MR. SHAPIRO: Yes, your Honor. It was on December 23rd, BMI wrote back and counter-proposed to give any license that was available under the consent decree which was entered into between BMI and the Department of Justice and ordered, adjudged and decreed by Judge McLean of this court, and one of those licenses that is permissible and required by the BMI consent decree is what we have referred to as a per program license.

Now, what is a per program license? A per program license is a license is a license in which the royalty is based upon any program in which a licensed copyright had compositions played.

Now, CBS takes the position that Zenith against Hazeltine, and it didso in the December 19th letter, that Zenith against Hazeltine authorizes the per use license and prohibits the per program license, and, your Honor, this is completely, in our view, an erroneous interpretation

of Zenith against Hazeltine.

This Zenith against Hazeltine, the merchandise being sold by the licensee was a television set. It had a cabinet, it had a picture tube, it had a printed circuit, it had transistors, it had screws and nuts and bolts and all the various things that make up a television set.

The patent in issue in Zenith against Hazeltine was a patent on an automatic control system, which is just one component of a television set. It could have been a transistor, could have been a printed circuit, could have been anything.

The Supreme Court held that against the will of the licensee, a licensor may not impose upon the licensee a royalty on the sale of a television set which contains no patented component, but if it contains any patented component, a royalty may affix, whether the licensee likes it or not.

I mean, that is the negotiation. That is the bargain. Take your package. Indeed, your Honor, in Zenith against Hazeltine, the Supreme Court recited that Hazeltine had insisted that they take the whole package of 500 patents, and the court found no harm in that. The court found harm in assessing a royalty on television sets where no patent was used.

Now, your Honor, what is a per program license? A program is like a television set. And a television set, with a patented device in it, is like a program with a copyrighted musical composition in it.

And therefore, Zenith against Hazeltine expressly says, expressly says that a license may exist where the royalty attaches to the television set, or the program, which contains, and only those which contain, either a patented device on the one hand or a copyrighted musical composition, we contend, on the other hand.

Now,your Honor, so much for payment. That is the way inwhich CBS proposes to measure payment on a per use basis which wasn't involved at all in the Zenith-Hazeltine case. We propose to operate on a per program bais which is analogous to the situation in Zenith against Hazeltine.

But,now, your Honor, on this lawsuit, for the first time again,CBS is alleging other things.

Now, they say that the license that BMI offers consists of a tie-in, there is a tie-in. Well, how do they articulate this tie-in? They do it by drawing a purported, and I suggest pseudo dichotomy between so-called accessible music and so-called inaccessible music, but what is accessible and what is inaccessible?

THE COURT: I gather that term is not used in the trade?

MR. SHAPIRO: It is not, your Honor, it is an invention for purposes of analysis and this is what I would like to do with it.

Accessible music, says CBS, is music which irrespective of whether it were licensed from BMI, would be available for an independent additional license from the copyright holders. That is accessible music.

Inaccessible music is music which for one reason or another cannot be licensed except from BMI, and CBS candidly contends, indeed, vociferously contends that the inaccessible music is necessary to its competitive survival, and that it must get from BMI.

And yet, your Honor, on analysis,it turns out that it is likely that the same piece of music will be both accessible, either accessible or inaccessible, depending on what happens after the license is granted.

Let me illustrate this. One of the songs in the BMI repertoire is, We Shall Overcome. Now, suppose, your Honor, that CBS has a 25 program series all pretaped, prerecorded, and in the 23rd program there is a scene in Central Park in which the crown spontaneously, but because it is recorded, not really spontaneously, bursts

into song and they sing, We Shall Overcome.

According to CBS' definition, that is accessible music.

But suppose, your Honor, that the CBS television cameras are in Central Park when there is a real peace rally going on, and they are reporting it as a news event and the crown spontaneously bursts into song and they sing We Shall Overcome. That, according to CBS, your Honor, is inaccessible music, because CBS did not have advance notice that it was going to be played.

So they need a license for We Shall Overcome, whether it comes out spontaneously in the park or whether it turns out in a program in the springtime that they decide to adopt.

Another illustration, your Honor: Let's suppose that after the license is granted, in the course of the programming season, the Ed Sullivan Show is about to go on and a particular Sunday night six days before Ed Sullivan's television show the producer of the show notifies CBS that on that show somebody is going to sing We Shall Overcome.

Now, if CBS can get in six days a direct license with the copyright holder, and in Paragraph 9 of Mr. Sipes' affidavit he says this is sometimes possible on short notice that music is accessible. But if it turns out that we

copyright holder is so perverse as to not wish to negotiate at a price CBS finds it able to pay for that song and cannot therefore negotiate for that song, then that music is inaccessible, and, your Honor, the question of accessibility or inaccessibility does not get determined until that six day period when CBS tries to negotiate the license.

And so we say, your Honor, that if you can't identify the tie-in product from the tied product, and indeed if the tie-in product and the tied product turn out to be the very same product, then it can't be a tie-in.

A tie-in, your Honor, is when a seller says to a buyer, "I'll sell you A and B," and the buyer says, "No, I don't want B; I want A," and the seller says, "Sorry, if you want A, you have got to take B."

You can't do that here so there is not tie-in in any way.

Zenith against Hazeltine recites that the licensor insisted on the package, and doesn't criticize that; it would appear that as a matter of law, as the Supreme Court at least looks upon it, this type of package, does not constitute a tie-in.

Now, besides the tie-in --

THE COURT: How do you distinguish this type of

package from the type of package of United States against Loew's?

MR. SHAPIRO: Your Honor, there is one thing, the consent decree here does permit, to the extent it is feasible, does permit the licensee to negotiate directly with the individual holders.

Now, this may be impractical in this particular situation. But in addition, and perhaps even more basic, your Honor, is that in this case CBS does not say, as the complaining party in Loew's, that we want this, but don't want that.

CBS says, we want it all, but we only want to pay for what we can't also get from somebody else.

THE COURT: In other words, you consture their position as being one in which they want an option on everything but only to pay for what they use?

MR. SHAPIRO: I don't think their position can be any different with their definition of inaccessible music, your Honor, because if inaccessible music is necessary to competitive survival they must want it and if you can't tell what it is, how can they possibly say we don't want accessible music, because they don't know that it's not inaccessible until it's played. So this is a very vast distinction, your Honor, between a situation

where sometimes somebody says, "Well, I will take your package, but I don't want patents A, B, C and D." They can't say that. They have to say,"We want it all, but we only want to pay for it if we use it."

And that is something that Zenith against Hazeltine specifically says a licensee may not do.

But, your Honor, there is even a more basic distinction between this case and other cases.

CBS makes other charges. They talk about price fixing and they talk about boycotts, and they talk about all the traditional anti-trust concepts that you can throw into the melange of conduct between licensors and licensees.

But, your Honor, this is an industry which happens to be different from the others,and the anti-trust laws have traditionally taken cognizance of these differences. Economic and business realities are the essence of the rule of reason.

CBS takes a completely schizophrenic approach to the problem. They say on the one hand, we can't live without you, got to have you.

THE COURT: You say that about them too.

MR. SHAPIRO: Right, no question about that, your Honor, we do indeed, particularly when they are paying ASCAP, we can't live without their paying us a reasonable, related

amount vis a vis ASCAP; we certainly say that.

But we want to do business with CBS. Nobody is arguing about that.

However, while they say on the one hand that they can't live without us, on the other hand they say they only want to pay us for what they really feel they can't live without.

But, your Honor, they don't want to pay for the service of accumulating and gathering and hoeing together and offering a path necessary to CBS's very survival.

They say, we don't want to pay for anything but what we absolutely need, and that we will pay for on a per use basis, so we will value that.

Well, your HOnor, this is not only unreasonable, it is not only inconsistent with logic, it is not only inconsistent with equity, but for those very reasons it is also inconsistent with law.

In Standard of Indiana, in 1931, and from then on, it has been held that a patent pool is not per se illegal, a patent pool is subject to the rule of reason.

Now, a patent pool, as defined in Standard of Indiana is a horizontal coming together, a combination. There is no question about that.

And, your Honor, when there is a patent pool

the operator of the pool sets a price, and he sets it for the patents of the different horizontal members of the pool, and therefore, if that were price fixing, there would be a per se illegality in a patent pool.

But Standard of Indiana and the cases throughout have said that is not so, it's a matter of rule of reason, and this was applied specifically, and I think very appropriately, in K 91 against Gershwin in the Ninth Circuit, where certiorari was denied and I'd like to take a moment on that case, your Honor.

It should be recognized that CBS takes the position that the ASCAP and the BMI conduct is identical for purposes of anti-trust scrutiny, and it happened to be the ASCAP licensing arrangement that was under scrutiny in K 91 against Gershwin, so it's equally applicable in our case.

And there, in upholding the ASCAP licensing provisions, the Court said:

We agree with the trial court that the activities of ASCAP do not constitute a combination in restraint of trade or a monopoly within the meaning of the ShermanAct.

ASCAP is certainly a combination but not every combination is a combination in restraint of trade or a monopoly.

Now, your Honor, the Supreme Court ordinarily,

when it denies certiorari, we don't regard that as a precedent, because you never know what's in the Supreme Court's mind and you can't cit it and say, well, they didn't want to hear it for this or that reason. There could be any number of reasons.

But we are not handicapped that way in this K 91 case because the Supreme Court invited the Solicitor General

THE COURT: The Solicitor General, and I have that brief.

MR. SHAPIRO: Yes, and you have that brief.

And the Sherman Act has also been discriminatingly applied in the light of economic realities, your Honor, and that really is the essence of our argument.

THE COURT: How does Judge Ryan's opinion in the Sesac case some years ago fit into this group of cases, if youknow?

MR. SHAPIRO: Well, your Honor, I don't know what distinction there may have been in that case and this. But I believe that the Second Circuit Court of Appeals decisions and the Supreme Court are the controlling decisions, and we believe that we have the controlling authority, your Honor, and therefore whatever the decision was in Judge Ryan's Sesac case, we believe that we are sound here.

The Second Circuit has characterized Judge Ryan's language as rank dictum.

Your Honor, one of the elements in the K-91 case and one of the elements in the Standard of Indiana case was what I have suggested earlier, the availability of direct licenses by the copyright holders In our case in the consent decree that is provided for.

THE COURT: It is provided for, but it puzzles me. First of all, it says consent of all the copyright holders, doesn't it?

MR. SHAPIRO: As to a particular composition, your Honor, everybody who has an interest. That is correct, your Honor.

THE COURT: Isn't CBS asking for an arrangement which would of course obviate that "all" in the --

MR. SHAPIRO: There is a difference. There is no question about there being a difference between the situation with respect to ASCAP and the situation with respect to BMI. The consent decrees are different, but they were different because the Court and the Department of Justice concluded that the vices that were sought to be corrected were different. But the consent decree itself does provide what the parties and the judge in that case collectively felt were necessary to obviate violation of law.

THE COURT: I understand that. I take it CBS takes the position that, first of all, it is not bound by that and, secondly, that there is a state of facts today which may or may not be different from what it was in 1966. I would be interested in knowing how it would operate, how one would go about it.

MR. SHAPIRO: Let's say We Shall Overcome is owned by Pete Seeger. One would go to Pete Seeger. One would say, "Pete Seeger, we'd like to license We Shall Overcome."

Mr. Seeger would say, "All right." He would come to BMI and he would say, "BMI, I want to grant a direct license to CBS on We Shall Overcome." BMI, under the consent decree, would have to do it.

THE COURT: I don't know whether Mr. Seeger was the only person involved. In many cases there would be more than one.

MR. SHAPIRO: If there were a publisher involved they would both have to come to BMI and selectively seek that. Yes, they would, your Honor.

I would like to point out that in all the time ASCAP has its provision CBS, to my knowledge, has never once availed itself of the direct license. April Music, Inc. is a publisher which happens to be an ASCAP member and which is a subsidiary of CBS and CBS has never

gotten a direct license, as far as we know, from its subsidiary April Music, Inc.

Your Honor, in K-91 in the Solicitor General's discussion the petitioner maintained that individual arrangements such as we have been discussing are not practical and Solicitor General Griswold says:

"Petitioner maintains that individual arrangements are simply not practical. We agree that in most if not all instances this is true, but this simply enforces the justification for a blanket license system."

We think that is really what the situation is, your Honor. Right now CBS is operating without a license from BMI. As far as we know, they have not approached any publisher or any writer seeking direct licenses from them by passing the BMI licensing arrangement. The consent decree reads as it reads and they could in some instances certainly do that, but they haven't done it. It really isn't practical. That is apparently not what they want. They really want a license on all, any and all compositions from BMI, but they don't want to pay for it except on a per use basis. That is really what is involved here.

In any event, your Honor, even apart from the merits of the antitrust we take the position that the case

is dispositive for the absence of an antitrust defense in this case. However, under two important decisions in the Second Circuit, one about 20 years ago and the other four days ago, we believe that there is not any necessity for your making an ultimate determination on this motion of the ultimate legal question.

THE COURT: I'm glad to hear that.

MR. SHAPIRO: Your Honor, in the Semmes v. Ford case, Judge Henry Friendly writing, he talked in terms of the balance of hardship. What happened there was that in a litigation between Ford and an automobile dealer called Semmes, Ford issued a notice of termination of the dealership and Semmes moved for a preliminary injunction pendente lite against that termination. The preliminary injunction was granted by Judge Ryan.

Now, the Court of Appeals reviewed that temporary injunction and reasons why it was granted and the reasons why the termination had taken place The termination was based upon alleged fraudulent submission of warranty claims and the Court of Appeals said that those charges are fraudulent submission of warranty claims were substantiated on the motion, but the Court said:

"In light of the inbalance of hardships affirmance of the temporary injunction does not depend on a holding

that Semmes had demonstrated a likilihood of success. It is necessary only that Semmes has raised questions going to the merits so serious, substantial, difficult and doubtful as to make them a fair ground for litigation and thus for more deliberate investigation."

The Court of Appeals cited Hamilton Watch Company v. Benrus.

THE COURT: Right.

MR. SHAPIRO: That was on a motion for a preliminary injunction which is directly applicable here where we contend that the denial of the relief sought preliminarily will lead to the destruction of the business.

In Bell v. Cataldo, decided 20 years ago, the Court in disposing of the entire matter -- this was at the end of the case -- held that even though there may have been marginal antitrust violations which had been asserted in defense of copyright infringement action, that nevertheless the Court should enjoin the copyright infringement because where the piracy is unmistakable and the antitrust violations are at most marginal or doubtful that the Court should grant ultimate relief on the copyright infringement. That goes even beyond the Semmes, which is really before the Court here today.

Now, your Honor, on the question of comparable

hardship, we, of course, are talking about destruction, as I have said, and I won't reiterate it ad nauseum.

THE COURT: What is the total revenue of BMI?

MR. SHAPIRO: I can find out, your Honor, by asking the president, who is here in court. I don't know it

THE COURT: If it is material that you don't disclose, I'll understand.

MR. HRUSKA: It is in camera.

MR. SHAPIRO: It is over $30,000,000.

Your Honor, the question of the likely destruction of BMI is not a subjective concern by BMI and BMI does not make it in a vacuum.

I would like to point out, your Honor, in the reply affidavit that NBC is being used by BMI in another lawsuit. NBC also has made application before Judge Ryan for an interim fee in United States v. ASCAP. In connection with its application for an interim fee with respect to ASCAP in the proceedings before Judge Ryan NBC referred to its litigation with BMI where it is a defendant and is asserting this position against NBC.

Your Honor, the financial vice-president of NBC said this in his affidavit:

"If the interim fees fixed for ASCAP are disproportionate in amount to fees received by BMI it

could well be, as BMI contends in its lawsuit" -- your Honor, in its lawsuit against us -- "that ASCAP would be able to raid BMI of its members and drive it from business."

Now, your Honor, that also is the view of the industry, and in Exhibit 3 to Mr. Cramer's reply affidavit there is an editorial in Broadcasting, which is the voice of the industry, that says:

"We can understand networks and stations wanting to pay less for music and the music organizations wanting them to pay more and we are happy" -- as we are -- "to let the courts decide the claims and counterclaims. We do suggest, however, that of them all BMI's claim that its competitive ability is being threatened is the most pressing. Whether by negotiation or court procedure BMI must be allowed to remain a viable competitor to ASCAP while the other questions are being decided, otherwise it could win its case here after it went out of business."

Now, your Honor, everything is comparative in a motion for preliminary injunction where the equitable powers of the Court are being invoked. The question is one of comparability. What is the injury to CBS here assuming that your Honor were to grant BMI's motion?

Let's suppose, your Honor, that it turns out in the ultimate that CBS has paid an amount to BMI during the course of this litigation in excess of the amount that it has been ultimately required to pay for copyright infringement or for anything else.

THE COURT: Required or applied against?

MR. SHAPIRO: It would be applied as a question of irreparable injury to CBS. Only BMI is destroyed during this litigation, so there will be nothing to credit. That, I believe, is CBS's position, that the irreparable injury will be that BMI will not survive the litigation and therefore not be available to give it a license against which any overpayment can be credited. Other than that it is just a use of some money for a short period of time.

THE COURT: We can't know how short, but still --

MR. SHAPIRO: We hope it will be short. If it is protracted it is all the more reason, your Honor, to preserve -- if BMI is destroyed not only does the private interest of 28,000 affiliates who have substantial interests in the continuation of BMI, not only is that affected, but of course the public interest in competition is affected

Let me say one word about the CBS counter proposal here.

THE COURT: Good.

MR. SHAPIRO: CBS is proposing to pay something, they say, and they talk about a schedule which is annexed -- I believe it is one of the exhibits, possibly 9 to the Sipes affidavit, in which they say they will pay in accordance with that schedule, that is, what BMI pays for its affiliates That is not what BMI pays for its affiliates. That is a minimum schedule. What BMI pays to its affiliates is what it has to pay in order to remain competitive and viable against ASCAP.

In paragraph 20 of Mr. Cramer's reply affidavit formulae and bonus arrangements are spelled out which are the vehicle whereby good affiliates are retained or good affiliates are sought.

THE COURT: I wasn't aware until last night when I read the reply papers that the actual pay by BMI to the affiliates are not what is set forth in the affidavit, but you do operate under formulae for the determination of what you pay your affiliates. You don't wait and find out what ASCAP is paying them and then pay them five cents more.

MR. SHAPIRO: No, your Honor.

THE COURT: Is that so? I'd like to know your point on whether arrangements are made, what we will call

in layman's terms, cost plus arrangements, as to whether the pendente lite proposal is feasible. I understand that you don't pay these rates, but you do pay some rates

MR. SHAPIRO: We pay some rates. The rates I would invite your Honor's attention to are in paragraph 20 of Mr. Cramer's reply affidavit. May I make one thing clear? BMI distributes everything to its affiliates except administrative expenses and prudent reserves, so that it is circular, and to say: Well, if you only pay them this then you don't have to get more than that because whatever you get you distribute in one way or another --

THE COURT: I'm not suggesting whether it is feasible from CBS's point of view because it seems to me what I'm suggesting may be what they suggest themselves, that it puts their payments, in a sense their payment destiny, into your hands. What happens if you raise your fees on their proposal? Have you any reaction to that?

MR. SHAPIRO: Yes, sir, your Honor, there are two reactions to it. First of all, in this industry the relationship between ASCAP and BMI is essential.

THE COURT: Of course.

MR. SHAPIRO: CBS is arranging to pay ASCAP on a blanket basis. They are arranging, according to their proposal, to pay BMI on a per use basis. Your Honor, if

you would look at their memorandum on pages 43 and 72, they make the statement which is dispositive on this. They say that "If we are required to pay somebody on a blanket basis and somebody else on a per use basis we will boycott the per use music and we'll use the blanket music," so as long as they are paying ASCAP on a blanket basis BMI is out of business, your Honor, if we don't have a blanket basis of some kind.

Now, there is no magic in the particular percentage that we proposed in this motion. We have to be viable We have to have a relationship with ASCAP's available money If an arrangement can be entered into which will place BMI in a viable position because of the relationship between ASCAP's income and BMI's income, then we can survive, but, your Honor, we are not asking for a giveaway. We are not asking for a handout. We are basing all of this upon the relative use of music. Nobody has quarreled, your Honor, with the fact that 67.4 of the music used by CBS as against ASCAP music used by CBS is BMI music.

THE COURT: I guess there is a little bit of quarreling as to the statistics.

MR. SHAPIRO: As far as CBS is concerned All that they have done is take one week out of eight and a half. We took an eight and a half week period starting

at the time of infringement, January 1, 1970. We took an eight and a half week sample. It was continuous. It was not selected. We didn't take this week or that week. They have taken some week. They have come up with 55 9 per cent.

Now, your Honor, they did not say: Your figures on eight and a half weeks do not properly come to 67.4 per cent, and the fact of the matter is that we base this on the figures they gave us, so if there were any quarrel they would have as much access to the information as we do. All they say is one week in the eight and a half is typical. We don't agree with that, your Honor, and we say 67.4 for the eight and a half week period since January 1 is a very valid indication of the ratio of music used by CBS.

Now, your Honor, that being so, I mean, this is not saying: Well, you've got to keep us relative to ASCAP even though we don't deserve it. That is not the point here. We deserve it, and it is going up, and there is no quarrel by CBS as to the fact that their programming changes for the next year, next season, are going to increase the ratio, not decrease, of BMI to ASCAP music. There is no quarrel with that, your Honor, by CBS. So that if the 67.4 per cent is right for eight and a half, 70 per cent is not an outrageous projection. In fact, it is

conservative and modest.

When you have two things come together, a confluence of equity and necessity, that confluence is what the equity powers of this Court are calculated to give life to and when the alternative is destruction of a competitive enterprise in a concentrated industry this Court's powers are called upon to take whatever action is necessary to rectify this disparity, and that, your Honor, essentially is our position.

Now, if there is any point, your Honor, where oral testimony would be helpful to you, we proffer it If there is any point, for example, on the question of whether there might be some other formula or some other arrangement which would accomplish the same result in principle -- we are not wedded to anything. We want to survive and if we can survive we would be willing to discuss and negotiate and work with your Honor on a formula that would work, and we offer to do that.

THE COURT: Thank you very much. Is Mr. Hruska next?

MR. HRUSKA: May it please the Court, my name is Allan Hruska and I represent the plaintiff, CBS. This, of course, is a motion for a preliminary injunction and I think in the ordinary course of events motions for preliminary

injunctions should not be granted unless there has been a showing of probable ultimate success. There is a rare case, the one out of a hundred, where the issues are so difficult, where the imminent injury to the moving party is so clear that perhaps on those grounds alone a preliminary injunction motion might be granted, but this is certainly not that kind of case.

In the first place, BMI has not only failed to make a showing of probable ultimate success, I think the record shows it is probable ultimate failure. In the second place, BMI's point bout imminent irreparable injury is insufficient. It has not come up with a single shred of direct evidence of anybody leaving the BMI organization because of anything we have done. There is no evidence of anybody leaving and certainly no evidence of any termination from this organization.

THE COURT: You feel they have to wait until the situation becomes that serious actually?

MR. HRUSKA: No, your Honor. I think that, however, in the balancing process that Mr. Shapiro suggests that there has to be some direct evidence of imminent irreparable injury and there isn't any evidence. We haven't paid ASCAP any royalties from 1970 yet.

THE COURT: I know.

MR. HRUSKA: And so right now we are not facing a situation in which royalties are being paid.

THE COURT: What is the date of the next hearing with ASCAP?

MR. HRUSKA: The next hearing is on August 10

I should state, your Honor, that the application for an interim fee made in the ASCAP consent decree proceeding with CBS was made by ASCAP, not by CBS. We entered that consent decree proceeding solely to minimize the exposure to infringement litigation that we knew we'd get into when these licensing organizations rejected our request for per use terms. We state that in our complaint That is the only reason we went into it. There is only one possibility on which we are going to end up paying ASCAP an interim fee in that proceeding on a blanket basis and that is if your Honor rejects our per use terms on this motion. That is the only possibility. Otherwise we could that we start to pay BMI in accordance with the payment schedule, and the concept of bonuses and guarantees was as new to me as it was to your Honor. I read it for the first time last night. I think it is probably going to turn out to be a minor matter. I don't think it ought to hold up the conditioning of the granting of the motion on the payments. We might be able to work

any problems we might have on bonuses and on guarantees We have to see what our share of those bonuses and guarantees would be. We'd have to see what the trend has been. We'd have to see how significant they really are, the extraordinary gains in membership that BMI has made. It is quite conceivable that we could work something out and if we coulán't we could bring that dispute, which I think is secondary or subsidiary to your Honor for resolution at that time

What we do want to do if this motion is denied or granted conditionally on the payment -- first of all, if it is denied we will make the same offer to BMI as we did in our papers after the denial of the motion. If it is granted conditionally we will withdraw from the ASCAP consent decree proceeding and we won't pay ASCAP any more than that fee either on an interim basis We want to pay for the music we use.

THE COURT: Do you want to pay them any more or on a different basis?

MR. HRUSKA: On a different basis. What we want here are per use terms. We want the right to buy music like we buy any other program, element by element or use by use

THE COURT: Let me say that Mr. Shapiro's position

would have a certain validity if it was the right to use all of it, which is illogic.

MR. HRUSKA: We don't want to have to deal with BMI for music which is accessible from their affiliates. We are coerced and we are compelled into taking that.

THE COURT: What he says is that you don't want to have to deal about music that is accessible but you want to be sure you can go to them if the music isn't accessible but you don't know which is, therefore, ergo, you want an option to deal with them or --

MR. HRUSKA: May I answer the question this way, your Honor? BMI by creating its pool, by making that pool available to our competitors compels us to get a license to get the right to use elements in that pool, copyrights in that pool, which we cannot obtain from the BMI affiliate directly but which our competitors would have if they took the license to the entire pool. We have got to deal with them.

If a man points a gun at your head and says, "I will not pull the trigger but get down on your hands and your knees," it is not a question of wanting to get down, but --

THE COURT: You are not sure you want all those things. The only reason you want it is because they are

forcing you to want it.

MR. HRUSKA: They are forcing us. If there was a supermarket in the City which was the only supplier of salt, no other grocery store or supermarket has any salt on their shelves, you would have to deal with that supermarket and go through that door to get salt. But they said: "As acondition to going through that door you've got to buy everything else, all your other requirements of groceries from us," we might want to go through the door, we might even want some of the items on that shelf because some of those items might be better --

THE COURT: But you wouldn't want them all.

MR. HRUSKA: That is what we are compelled to do.

THE COURT: You are getting close to the question of the legality of the pool. What do you think about that?

MR. HRUSKA: I think the pool as operated is certainly and I think also that it is difficult to conceive of circumstances under which this pool could operate without having some direct restraint on competition. I think also the logic to that -- the divestiture of the copyrights from that pool -- we don't ask for that. We haven't gone that whole route. We think we are going to be held by per use terms. We may be wrong. It may be that the evil of

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this pool is such that we can't even get competition going under per use terms. We don't think so. We think there will be some competition. We think it will help. We think it will relieve the tie-up. All we ask for is a step at a time.

THE COURT: You want to make your children independent and see if you can get along that way.

MR. HRUSKA: That is right. We think that the dismantling of that pool is necessary but we haven't gone that far yet.

THE COURT: Excuse me for interrupting you.

MR. HRUSKA: That is all right

I would just say on the question of membership, your Honor, on the irreparable injury there is some evidence in the record, hard evidence, that in the middle of 1969, about a year ago, from that point in time to this point in time the record shows that BMI has had a net increase in their affiliates of 3300.

THE COURT: Is that up to the 29,000 figure or from?

MR. HRUSKA: That is up to the 29,000 figure In other words, during the first months of this year when all these effects are supposed to have occurred presumably some of that gain has occurred.

All right, well, our basic position on this motion is obviously that PMI is misusing the copyrights in this pool.

Now, the misuse defense is a defense which bars the enforcement of a statutory monopoly when the holder of that monopoly uses the leverage of it to exact a reward greater than the constitution and the statutes intended to give that monopoly. A clear case of misuse occurs when the holder of a statutory monopoly uses its leverage to compel a licensee to purchase from the monopolist another product, one not included in that monopoly grant. It might even be something included in another monopoly grant.

And by the way, I should point out that the Supreme Court in the Zenith case certainly did express its approbation of the Seventh Circuit direct holding enjoining the package licensing that went on in that case, but that wasn't even appealed by HRI in that case, Hazeltine Research.

And misuse also occurs when a holder of a statutory monopoly uses its leverage to restrain competition between that monopoly and other products, and that is so because the extent to which competition is restrained between the statutory monopoly and other competing products is the extent to which that statutory monopoly is strengthened, and that degree of strengthening is not one of the rewards,

obviously, not one of the rewards contemplated by the constitution or by the statutes.

Now, I don't think there can be any serious question --

THE COURT: There isn't any question about the law.

MR. HRUSKA: About the application.

THE COURT: The question is the analysis of this particular state of affairs and whether it constitutes a tie-in or whether, as Mr. Shapiro says, it doesn't because you want everything, so what is being tied, or whether the analysis of accessible or inaccessible is accurate.

MR. HRUSKA: I think the only dispute we have on the question of the misuse doctrine is whether it details a balancing process or not, and I think it is very clear that it does not for the reasons we discussed at length in our brief, and I won't repeat them now.

In the Zenith case it involved balancing, for example. I want to get to tie-in right now.

BMI is a corporation which has affiliated itself with 29,000 businessmen and corporations, and those people own copyrights to 1 million songs.

Now, the BMI affiliation agreements which hold this group together quite rightly prohibit those

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29,000 businessmen and corporations from licensing their music to anyone directly. Anyone who wants to license music in that pool must deal with BMI under the affiliation agreements.

THE COURT: How does that fit in with the consent decree?

MR. HRUSKA: Exactly. The consent decree, theoretically opens the door a little.

It says, if a user of music can find all the writers and all the publishers of a particular composition and can get them to write to BMI for the right to grant licenses for a specific performance of that particular composition to the user, why, then, BMI is compelled to grant such permission.

Now, that opening just doesn't help.

THE COURT: How much larger an opening could there be if there is going to be a structure of this sort at all?

MR. HRUSKA: No opening will do us any good or any broadcaster any good, and that is our principal point, unless BMI either is disbanded or licensed on per use terms. That is the only thing that is going to help.

Now, in describingthe tie-in, let me take the CBS Television network situation.

Our papers show that approximately half the music

we use is accessible from the BMI affiliates themselves under the assumption that they were entirely free to deal and half inaccessible --

THE COURT: I can't say that I quite follow the determination. I get the philosophic distinction between accessible and inaccessible, but when it comes down to brass tacks, what would you consider to be some good examples of accessibility? Or inaccessibility is easier to understand, especially in view of what you just said about difficulties of getting all these people to sign up anyway.

MR. HRUSKA: Right. Accessibility would come about in a variety of ways. First of all, as to our variety programs, where the inaccessibility point is most dramatically obvious, I think it is also clear that a significant portion of those songs would be accessible to us in this way: We could predict, before a television season, those BMI publishers whose catalogs are so large or have contained over the years the most popular songs, we could predict that a significant portion of our requirements would come from those catalogs, and those are the people we deal with before the season.

THE COURT: Would you deal with them on a per use basis?

MR. HRUSKA: Yes, we could deal with them on a

per use basis. We could deal with them on lots of bases. We could deal with them to obtain the right to use their songs in perpetuity, any number of things, and there may be any number of reasons why those people might be willing to license that music to us at less per use than they would receive from BMI for the same use.

THE COURT: Are those affiliates parties to this action?

MR. HRUSKA: Yes, your Honor, they are.

THE COURT: So whatever comes out of this, they would be bound by it.

MR. HRUSKA: Exactly. Now, another area of accessible music would be those songs as to which we got long letters. For example, music we use in motion pictures is music as to which the notice is fairly substantial; I mean, we might get six months, we might get a year in some cases, notice of the use of music in those films.

Now, as to the more recent films, we could in many, many cases go out, find the publisher, find the composer and deal with them.

THE COURT: Are they showing recent films on television?

MR. HRUSKA: Yes, your Honor.

THE COURT: When?

MR. HRUSKA: There is one on tonight that is very good, which I think was put out about two or three years ago. I recommend it.

Obviously, the older the film, the more difficult it would be to get rights, given any number of months of notice, to go out and negotiate for those rights. But some of that music would be accessible.

Also, there is a great deal of music that is written specially for our programs. The producers of those programs retain composers to write music for those programs, film series, for example.

THE COURT: And they are all members of either ASCAP or BMI?

MR. HRUSKA: Yes. But there is no reason in the world why the producer at the time he negotiates with the composer, why he can't negotiate for a performing rights license to CBS. That is accessible music.

Now, the fact that some of the people we have a chance to deal with, even perhaps on a spot basis, even perhaps given two days notice of the use on the Glen Campbell show, the fact that some of those people might quote too high a price, might want unreasonable terms, doesn't take them out of the area of competition. We would at least have had the benefit of the bid, and that is com-

petition. But we are foreclosed from that.

THE COURT: You mean it might turn out, to take a theoretical extreme, that in spite of all your efforts, you came back to BMI every time because nobody would do business with you.

MR. HRUSKA: That is theoretically possible, but I think it is unlikely I think it is unlikely, exceedingly unlikely.

But if it happened, and it happened for the reasons that BMI suggests in the papers --

THE COURT: What would be the need for a composer to license directly to you? Would you offer him more than BMI or what? I would think you would offer him less.

MR. HRUSKA: I think that we probably would offer him less, although we might offer him a different type of arrangement that appealed to him more. I mean, he might be a man who wanted to license his music forever or for two years or what have you, for $500 or $1,000 -- I am just picking figures -- because he wanted that money now; he didn't want to wait to receive distributions some time in the future.

And there might be other incentives here, too.

THE COURT: In any event, you would like the chance to try.

MR. HRUSKA: We would like to try it, exactly.

THE COURT: All right.

MR. HRUSKA: Now, the reason that we are foreclosed from what we call the accessible music -- and let me add on this point, it is true, it is not an industry definition; it came out of my head, I made it up; it is a term of reference to describe a very obvious basic, practical, economic reality in this industry.

THE COURT: I notice you have got us all using it, anyway.

MR. HRUSKA: It helps to use one word instead of ten. It is always of some value, I think.

But the way in which the BMI licensing practice has foreclosed competition in the accessible music is this: That the blanket terms that BMI insists upon contain basically four significant characteristics significant to this motion.

First, the license he must accept and pay for performing rights to the entire BMI pool. The license he can't select, he can't choose, and that pool has 1 million musical compositions. I believe to a moral certainty that there is a significant number of those musical compositions that haven't been performed on any radio station or any TV station for 20 years, and we have got interrogatories addressed to this subject, and by taking the entire pool,

of course, we are paying some portion, at least, of the administrative expenses of maintaining songs we don't want to license, but this is something we have got to get to later on in the case. I just want to mention it here.

The second distinctive characteristic is that the license he must pay during the term of the license a fixed percentage of the revenues it receives for the use of its broadcasting facilities.

THE COURT: That isn't inevitable in the system.

MR. HRUSKA: It could be a flat amount.

THE COURT: That is what BMI has asked for.

MR. HRUSKA: It doesn't change anything at all. It doesn't change anything because of a third characteristic, which is that that percentage or that amount does not vary depending upon the licensee's actual use of music in the BMI pool.

And the fourth characteristic, that that percentage or flat amount is not reduced if the licensee obtains rights directly from the BMI affiliate.

In other words --

THE COURT: Really, it is No. 3 that is the heart of the matter. Everything revolves around the fact that you have got to pay the same price, no matter how much you lose or how little, whether you want the old pieces or don't,

whether you make them deal with somebody else or not.

MR. HRUSKA: One price, one price. And the result of that is that the licensee is automatically stripped of any economic incentive to deal directly with the BMI affiliates. Why pay twice for the same music? Why deal with the Beattles or their publisher for the right to pay twice for their large catalog of songs when you are already paying for that, you are already paying BMI for that?

And so automatically, by virtue of BMI's insistence on these terms, competition among 29,000 businessman is snuffed out as effectively as if those people weren't in existence.

The per program terms have the same effect. It is a little longer to get there, but they have the same effect.

Under per program terms, instead of paying X per cent of your time income for the year, you pay several times X per cent of the time income attributable to every program using any BMI composition. It is kind of a floating lien. It attaches through one use, and once it attaches it applies to --

THE COURT: You mean one use in a program.

MR. HRUSKA: One use in a program, exactly. You could have an hour's program that might use one BMI

composition and 39 ASCAP compositions.

THE COURT: Your position really is it is a microcosm of the blanket license.

MR. HRUSKA: Precisely, that is what it is. There is even no point in trying to develop rights, to try to get all the rights that are going to be used in a particular program. You know you will never get it. It is kind of an obstacle course in which each barrier is progressively higher.

THE COURT: You mean you have to use some BMI and ASCAP music in every program.

MR. HRUSKA: No, I don't say that. I think there are some programs in which that is not true, but it is a very rare occasion on a musical program, a variety program, and certainly every category of our programming contains appreciable amounts of BMI music and substantial amounts of both accessible and inaccessible BMI music, so you know before you start that the race isn't worthwhile, you are not going to make it.

And that is particularly so on per program terms because those terms give that last composer or that last publisher, assuming now you have gone through nine publishers to get the rights to nine songs and there is one left, gives that last fellow an immense bargaining position. I mean,

it is a holdup situation, really. And so that fact alone makes the possibility of running this obstacle course even more remote.

THE COURT: Has anybody ever operated on a per program basis?

MR. HRUSKA: Yes, your Honor, I think that there are very, very few. If that affidavit is no longer in camera, we have the number. I think of all the hundreds of television stations in this country, six or seven may have per program licenses.

The number is two. I think this whole thing about per program licenses is a smoke screen. I think if we went through discovery in this case we could show that there are considerable efforts exerted to prevent people from getting per program licenses, but it is in the decree, it is part of the facts we are confronted with in this preliminary injunction motion, and as a legal matter I don't think it makes any difference, because the fact of the per program license is just a microcosm of the blanket license; it has the same effect.

All right, now, this situation fits the elements of a tie-in violation. It fits the elements of price fixing. It fits the elements of boycotting, exclusive dealing. The labels here are not terribly important.

What is happening as a basic matter of economic reality is that we have got to deal with BMI for this inaccessible music because they have created that need by creating the pool, by making it available to our competitors on very short notice, and we have got to have it. We can't exist without it. But we have got to pay the penalty in order to get it of giving up any right to deal with their affiliates.

THE COURT: Yes. Well, they don't deny that you do. They say that is perfectly proper because as a rule of reason it is a copyright pool. I think that is what they say.

MR. HRUSKA: I think that is what they say, too, your Honor, but tie in is per se violation, price fixing is a violation. Rule of reason doesn't apply.

They cite the process-cracking case, a 1931 Supreme Court decision, which has been overruled sub silentio by the Supreme Court since that day.

THE COURT: I am puzzled; if these arrangements are as clearly illegal as they are said to be, with the strength of the networks and the stations opposed to them over the years, that they haven't been hauled into court and forced to behave themselves long before this.

MR. HRUSKA: They have been hauled into court,

and their hauling into court by the United States Government has resulted in partial measures, and we have been trying to live with those partial measures, and we finally realized we could no longer live with those partial measures.

THE COURT: CBS was among the broadcasters who formed BMI?

MR. HRUSKA: Yes.

THE COURT: Could you give me a little background on how CBS and BMI happened to change their views?

MR. HRUSKA: I could just give you very thumbnail sketch in that broadcasters did form BMI in 1939. CBS was one of the broadcasters in that formation group. In 1959 CBS divested itself voluntarily of any interest in BMI and has had no interest in BMI since that time, and we regard BMI as a Frankenstein monster.

THE COURT: I was going to use that simile before but that is what I thought you probably would think.

MR. HRUSKA: It is pretty obvious.

THE COURT: Don't you think you are better off to have two of them instead of one?

MR. HRUSKA: They don't compete. It doesn't do us any good at all. We have to take our license from BMI and we have to take our license from ASCAP. Once we have that license and once these blanket or per program terms, where

we can't reduce amounts payable to one because we reduce the amount of music we use, they are not competing on price. There is no competition between -- yes, they compete for members, I understand that, but they are not competing in price.

If you don't get a use by use price, there is no price competition.

Now, just to illustrate this tie-in, this economic coercion point a little more, right now BMI says that they are not guilty of tie-in because CBS wants to buy from BMI the right to all music in the BMI pool.

We don't want that. It is not true.

The fact is, as I have said before, we are given no choice whatever about whether we deal with BMI or not. We have got to deal with BMI. No choice. And that is so because they have combined all these songwriters and all this music, but the fact that we are compelled to deal with BMI to fulfill one portion of our competitive requirements cannot possibly excuse BMI compelling us to take from BMI our total requirements.

Now, before we enter into a license with BMI, we can't identify which BMI music one month hence, two months hence, two years hence is going to be accessible or inaccessible, and the fact that a particular song might be accessible

at one point in time and inaccessible in another point of time just doesn't change the economic realities of this tie-in situation.

THE COURT: Let me ask this as an economic factor. Wouldn't you think that if you were granted a per use license that you ought to pay more for the right to be able to use anything?

MR. HRUSKA: We are absolutely willing to pay for that right. That is exactly what the Zenith case says. They say if you want the library card, in effect, if you want to go through the door of that supermarket, you have got to pay your share, your fair share of the administrative expenses of maintaining the pool, maintaining the supermarket, maintaining the patent pool itself. We are willing to pay for that.

We even propose in our papers one way of paying for it which we think is probably unfair to ourselves, and that is that we pay a percentage of their administrative expenses, which is based upon the percentage of fees we end up paying of the total BMI proportionate share.

So we are willing to do this. I mean, that is not an issue. I think the Zenith case makes it pretty clear that that is all that a licensee ought to be compelled to do in terms of getting that library card, that option to

the pool, bearing in mind always that that option is something which BMI has coerced us to take by its very existence.

We have no choice about wanting that option, about wanting to go through that front door. We must get to the songs. We must get to the right of the inaccessible music or our programs are going to go off the air.

Now, in price fixing, here we have again 29,000 businessmen that have refused to deal except through an exclusive selling agent.

Now, that just is about the clearest case of price fixing I have ever seen. Whenever BMI sets the price of music in that pool it is fixing the price on the products of those competitors. Every time it enters into a license with somebody, it is fixing a price on those products. There is no difference. I mean, if there were no BMI, if all the BMI affiliates got together outside of the BMI organization and agreed amongst themselves that they are only going to sell music at certain established, published rates, that is price fixing.

THE COURT: How does it work here? It works by negotiation, doesn't it, at the center, anyway? I understand what you say, that 29,000 combined and said they will only sell through BMI, but the actual price ultimately is a

negotiated price, isn't it?

MR. HRUSKA: You mean between BMI and the customer?

THE COURT: And whoever --

MR. HRUSKA: That's right, but it is a negotiated price on a million products. In other words --

THE COURT: I can see that you say that you have to buy a lot of things you don't want to buy in order to get any of them.

MR. HRUSKA: It is more than that. I mean, if all the steel companies in the United States got together and decided that they would only sell through an exclusive selling agent and that that agent would set negotiated prices with each customer, and then pool the results and dispense to each of the steel companies $10 a ton or whatever fixed amount they decided to receive, that is price-fixing.

It is a little more subtle when five competitors sit down at a table and decide they are going to rig the next bid, but not very much more so. It has the same effect.

Oh, yes, K-91. K-91, we think, is an illogical decision, and when the time comes in our issues against ASCAP, I think we will demonstrate that. But the main point is it doesn't apply to BMI.

THE COURT: Well, it doesn't literally, but why doesn't

it otherwise?

MR. HRUSKA: Because BMI, as a practical matter, has complete control over the price of the products, the copyrights. K-91 was based exclusively on the Court's finding that there was no evidence that the individual members of ASCAP were not ready, willing and able to deal with the broadcaster defendants in that case. Well, we got plenty of evidence here that those individual affiliates of BMI cannot deal with us, and they can't dealwith us and we can't get at them because BMI won't let us. It is a vicious cycle.

THE COURT: I understand it is a vicious circle or cycle or whatever, but I don't see why it is any different from BMI and ASCAP.

MR. HRUSKA: It is really not.

THE COURT: In that case it just happened --

MR. HRUSKA: The Court did say that under the ASCAP consent decree the Court had rate making power and that physically removed the price-fixing power from ASCAP. Well, there isn't any provision like that in the BMI decree. I think that argument is not logical, but, in any event, it doesn't apply to BMI.

THE COURT: I see.

MR. HRUSKA: Now, the Zenith situation. We think

the core of the Supreme Court decision in Zenith, which is applicable to this case, is that the licensee may insist on paying only for actual use.

The Court says that in so many words. It says other things, but it says that, and we think that BMI's rejection of our request for per use terms and their insistence on blanketed program terms is the necessary insistence element in the Zenith case, insisting that we pay on some basis other than on the basis of actual use.

Now, BMI argues that the only thing proscribed by the Zenith case is the monopoly holder's insistence that a licensee agree to pay royalties on products which do not use the statutory monopoly, and that each CBS program is a separate product so that BMI is entitled to insist that we pay the same amount of royalties for every program using any BMI composition irrespective of how many, one , ten, twenty; it doesn't make any difference, pay the same royalties because BMI says a program is a product and that is all Zenith proscribed.

I think that argument elides both the language and the logic of that decision.

As the Court said in so many words, the licensee can insist on paying on the basis of actual use.

But more than that, if the amount of royalties paid

by the licensee does not vary commensurately with its use, doesn't bear some relationship to the amount of its use, then that licensee is going to be impelled to use as much as he practicably can of the patentee's or the copyright monopolist's product. In other words, if he is going to have to pay a lot irrespective of how much he uses, whether he uses a little or a lot, he is going to use as much as he possibly can, and I think that is what the Zenith case was all .

THE COURT: Well, assuming that is true, do you think the same observations apply to the per program possibility? I know your objections to it on other grounds.

MR. HRUSKA: I think so, because take one program: Now, if you are going to have to use on that program two or three BMI songs because they are, you know, just smashing best sellers, and you are going to have some highly popular entertainer who insists on singing that song -- and that happens very frequently -- then obviously you are under some form of economic persuasion to use as many BMI compositions on that program as you can and possibly eliminate others, because you are using BMI.

And you know there is some fairly interchangeable music used on some programs, background music, for example, cues, bridges, music introducing somebody walking onto the

stage or what have you, and obviously you are going to be impelled to the extent you can without impairing the quality of that program to use as much BMI music in those categories.

Now, when you do that, you are giving up competing substitutes, and it is not simply the customer who is being hurt here, who is being forced to forego competing substitutes, who is being forced to lose out on the benefits of competition. It is the public, and this is a public policy doctrine. We are talking here about a statutory monopoly which is a special grant given to the monopolist not for his reward primarily, but for the public's reward.

THE COURT: Of course, the effect on the public is kind of unique in this situation, isn't it, because you are talking about only two groups owning practically all of the music. It is really not the same kind of effect as if you were choosing between 10 or 15 or 20 possibilities.

Now, if you knock it all out that is a different proposition.

MR. HRUSKA: Your Honor, I think these blanket per program terms are the very reason we only have two significant licensing societies in this country, because it is those terms that I have just described in talking about the Zenith case that compel you to fill your requirements out of a pool for which you have got to pay the same price, no

matterhow much in that pool you use, that dissuade the members of these organizations from leaving these organizations and competing with them. They know they are not going to be able to do it, and it is only if we can license music on a per use basis that there is any possibility of such competition.

THE COURT: You don't think you will have 10 Frankensteins, then, do you?

MR. HRUSKA: Not on a per use basis; we cannot have a Frankenstein on a per use basis, because that, as I say, relieves the tie to a large extent.

Well, BMI makes the argument that Zenith doesn't prescribe a lumpsum royalty, it only prescribes a percentage of sales royalty. Well, it just doesn't make sense. It shouldn't be that easy to avoid a holding of the Supreme Court.

The Court says it is unlawful, in the particular facts of that case, to charge a percentage of total sales. Why, I can't conceive the Court is going to permit an equivalent dollar amount, any dollar amount that doesn't vary commensurately with the use. That is just too simple.

That argument is made all the time, as a matter of fact, in tie-in cases.

In Loew's, for example, the movie distributors in

that case said to the television stations, "Look here, we have got a whole package of films. We have got Treasure of Sierra Madre and we have got Gorilla Man and we have got two or three other marvelous films and we have got Tugboat Annie. It's the same price for the package. You can take one or you can take all of them, same price."

Perfectly obvious what is going on. That is what is going on in blanket per program terms.

Now, as I said before, the labels are interesting in this case, the antitrust pigeon holes. We think these facts fit squarely in those pigeon holes. Those are per se pigeon holes, price fixing, boycotting, tie-in. They are violations of the antitrust laws irrespective of the purpose.

But I keep coming back to the important thing that is going on here, and that is a combination which forces you to deal with it by its very existence and forces you to deal with it on terms that prohibit you from dealing with its components, with its members.

THE COURT: Mr. Hruska, I would like you to switch now, because I think you have covered the merits of the case, to the formulas for any payments in case I determine that there ought to be payment.

MR. HRUSKA: Yes.

THE COURT: And I understand your proposals, so I would really like to ask you what is wrong with their prposals, putting aside whether it ought to be 70 or 65.

MR. HRUSKA: Yes, I will. Although I would just quickly like to correct a statement that was made, that we don't contend for the methodology of the 70 per cent. I mean, it is just patently specious as an averaging of averages of unequal things, but apart from that --

THE COURT: If we get that far down the road we can sit in a room and try to figure out what the proper factors are.

MR. HRUSKA: Your Honor, obviously we feel the motion, without our consent, ought to be denied, but if it is to be granted on consent, we feel that those terms ought to be equitable. There is no proof in this record or indication in this record that BMI needs, in order to fulfill its stated objective of maintaining the status quo, needs anything more than basically that payment schedule.

Now, we have got a new idea in the case about --

THE COURT: Have your people or anybody computed how much your offer would amount to as compared to their proposal?

MR. HRUSKA: Yes. If we were paying BMI last year on that basis we would have paid BMI roughly a million seven.

THE COURT: And you actually paid a million three.

MR. HRUSKA: A million six.

THE COUPT: That was close.

MR. HRUSKA: Very close.

THE COURT: Of course, there is a greater volume this year, and there would be a higher payment.

MR.HRUSKA: Of course, because it would be on a per use basis. You know that payment schedule has been in existence since 1968, except for these modifications that we pointed to in our papers.

For example, they did increase the basic payment in respect of a prime time feature use of a popular song from something to 72 cents. I think it was 36 to 72 cents. And interestingly enough, they increased that again in the third quarter of 1969, it went down again, and still gained members.

THE COURT: Let me ask you this: On the basis of your proposal, that is, to pay their costs or whatever you want to call them, plus a share of their overhead, what happens if they feel that their affiliated deserve more and they increase those costs? You are talking about the fixed present costs.

MR. HRUSKA: WE are talking about the extraordinary provisional remedy of forcing us to pay some money when the

case is going the other way.

THE COURT: I understand that. I am asking you what is your proposal? You are proposing to hitch your wagon to this particular schedule, is that right?

MR. HRUSKA: That's right, because it has been demonstrated to be highly effective.

THE COURT: All right.

MR. HRUSKA: Ten years BMI has tripled its membership while ASCAP has doubled its membership. This payment schedule is, if anything, a ceiling on what the price establishable in a competitive market would be.

We think we are going awfully far in adopting the schedule.

Now, I have talked about --

THE COURT: I would want you to comment -- putting aside the methodology -- as to what is wrong with the approach of paying a percentage of what you ultimately agree to pay ASCAP.

I know ASCAP's views, or at least I think I do.

MR. HRUSKA: Well, basically, I don't think there is anything inthe record to support it, but right now, like I say, we haven't agreed to pay ASCAP anything, and if we want to start paying BMI right now, there is only one basis on which we can do it.

If it turns out -- which I don't think will happen -- but if it turns out, just arguendo, that we were to pay ASCAP on some other basis some more money, BMI could apply for further relief, but there is one point here that I really want to focus on. It is important.

BMI says that if we pay BMI on a per use basis and pay ASCAP on a blanket basis, we are going to favor ASCAP music.

THE COURT: They say that you say that, really.

MR. HRUSKA: We don't, you see; that is what I want to get to. We don't say that. We say just the contrary. If this grant is conditioned on our payment of BMI on a per use basis, in accordance with the BMI payment schedule, our judgment, our conviction that ultimately ASCAP is going to be made to receive payments for this year on a per use basis as well, that conviction of ours is obviously going to be strengthened.

What I am saying is we have asked in our complaint for per use terms retroactive.

THE COURT: If I decide in your favor here, you mean that Judge Ryan -- is that what you are referring to -- will follow that pattern?

MR. HRUSKA: No, your Honor. I think if you decide in our favor here Judge Ryan will have nothing to de-

cide.

THE COURT: Meaning what?

MR. HRUSKA: Meaning that we will withdraw from that consent decree proceeding.

THE COURT: I see.

MR. HRUSKA: As I said, the only reason we went into that proceeding was to minimize this risk of massive infringement litigation which we have gotten from BMI. We couldn't eliminate BMI because their consent decree doesn't have that type of provision, but we did with ASCAP, and we tried to work something out but it is just not going to work, I think. And we have got a lot of disputes, and we think that these facts apply equally to ASCAP.

And the fact of the matter is that, to be frank about it, if there is a decision, as obviously we think there should be, upholding these positions and we end up paying BMI on a per use basis right now in accordance with their payment schedule, then there is no reason why, I mean, we are just going to take that extra risk with ASCAP as well.

I mean, we are taking risks here. There is no question about it. Nothing is certain in litigation. We are lawyers, and it is businessmen that have to make these decisions. We can tell them we think you have got a cold

case, that these people are obviously violating the anti-trust laws, but there is always a question mark.

THE COURT: All right.

MR. HRUSKA: I have basically completed my argument unless there is anything further your Honor would like to ask.

THE COURT: I should say I am very glad to have this solid argument this morning, but I have read, with the exception of the in camera thing you were talking about, I have read all the papers and they have been very helpful on both sides, and I think very complete.

If I think I need anything more I won't hesitate to ask you, but at this stage of the game, as far as papers are concerned, I have enough.

MR. HRUSKA: I was going to suggest that we might put in a reply to the BMI brief we got last night. We usually like to reply in writing.

THE COURT: Well, I won't refuse you the opportunity, but I think it ought to be done very quickly because I am sure BMI want and I want to act on this quickly, not precipitously, by the end of the month, possibly because I am going away after that.

MR. HRUSKA: Could we have until next Thursday?

THE COURT: This is Friday; well, if you could get

it in sooner it would be helpful because I would like to get down to the ultimate thinking on this.

MR. HRUSKA: If I can, I will, yes.

THE COURT: Mr. Dean.

MR. DEAN: If the Court please, my name is Arthur H. Dean. I appear on behalf of American Society of Composers, Authors and Publishers, et al.

First, your Honor, I'd like to hand up a supplemental affidavit of Mr. Finkelstein that was sworn to and served yesterday.

If your Honor please, ASCAP has a very limited interest in these proceedings, but has nevertheless a very important position to the members of ASCAP.

As your Honor is aware, ASCAP was organized in 1914 by Victor Herbert and a number of other leading authors and composers who were having great difficulty at that time in being able to collect for their copyrighted music.

In Europe the authors and composers societies were governmental instrumentalities and the money was collected by the government by taxes on restaurants or casinos or theatres where their music was played, and the government was the official recorder.

Then after the Aldren-Rochell case, a consent decree was worked out, and the administration of ASCAP ever since that first consent decree has been under the close supervision of one of the judges here in the

Southern District,and the Department of Justice also has an interest in the operation of that decree, and the distribution of all of the net income of ASCAP has to be made under the various formulae that is set forth in that decree.

ASCAP set up a method of trying to record all of the copyrighted music that is played by the various agencies, and with the approval of the Department of Justice and Judge Ryan, we retained the Joel Dean Associates, no relation of mine, but a professor at Columbia, to set up this testing of the way the music was played andhow it was distributed.

So ASCAP, as a society, under the consent decree, is prohibited from distributing its revenues except in the precise manner that is set forth in this formula.

BMI, on the otherhand, can go out and buy music from individuals, and they often go out and enter into contracts in which they guarantee that if a person will resign his membership in ASCAP, that they will pay him large sums of money, even though he doesn't write any music at all.

It is in the record that BMI has paid out in the years '59 and '60 as much as a million, five hundred thousand dollars to 12 members of ASCAP on the condition

that they resign, and some of these payments go for their entire life, and they go for various periods; whether or not they write any music, and assign their licensing rights to BMI or not.

Now, ASCAP is prohibited from doing that.

Tastes in music change, of course. But basically the ASCAP repertoire is based on the well-known classical themes, the well-known popular themes.

Some of the greatest librettoists and songwriters of America have become members of ASCAP. And ASCAP has been one of the leaders in the development of symphonic and operatic and so-called classical music.

Today, of course, the tastes are for rock 'n roll and for hillbilly and western music or for the themes that are popular in show business, and BMI, not being prohibited by any decree, has been very astute in being able to go out and pay these very large sums of money, and in increasing its membership.

B - BMI was organized by the broadcasters. It is the creature of the broadcasters. Quite true. CBS and NBC have turned their stock back to BMI, but in its charter, no broadcaster can sell its stock except to another broadcaster.

It was organized by the then-General Counsel

of CBS, Sidney Kaye, who until very recently was its chairman, until very recently was both a director and General Counsel of CBS.

And there is a long history, which is quite natural, on the part of the officers and dircetors of BMI and the broadcasters, of using every means of which they could think of to try to push down the cost of the ASCAP music and to direct their musical directors to use the BMI music on the ground that they controlled it and they were the stockholders in it,and they got back their net proportionate after their expenses.

And there has been a long history of this in the various cases before the courts.

I would like to make clear, your Honor, as far as ASCAP is concerned, we don't have the slightest objection to this suit that has been brought against CBS by BMI, and we don't take any position on this case that BMI has brought against CBS, and we take no position on their alternative request for preliminary injunction to prevent infringements of their copyrights.

But the one point I want to emphasize is that I don't think you can compare the entire repertoire of ASCAP, which is available to all the musical directors who are directing programs on the networks, or on these

voluntary programs, or identification of music programs or the amateur programs, because it is like trying to compare the number of times somebody writes a theme song for margarine, and every time the advertisement appears, that theme song is heard on the networks; now you compare that to a magnificent symphony, then you'd have maybe a hundred times for the margarine theme song to one time for a symphony.

So my point is you can't compare numbers with values. It's like trying to compare a million Fords to ten thousand Cadillacs.

And the one thing that we do want to stress is the fact that we don't think that there ought to be any relationship between whatever amount is eventually worked out to be paid to the networks by ASCAP and the amount that is paid to BMI.

We think that would be a completely improper, it would be a completely inappropriate type of relief.

This is a theory that both BMI and the networks have tired to propagate and maintain for a long time, and that is that every piece of music was equal to every other piece of music, and all you had to do was count them or weigh them like fungible bushels of wheat, instead of trying to compare some well known song or well known

symphony or well known melody written by a famous song-writer to something that had just been written for the purpose of selling one of the coca colas or something like that.

I hope, your Honor -- I know you have got an abundance of papers in this case, but I do hope that you will have an opportunity at least to read through briefly the pages which are attached as Exhibit E to Mr. Finkelstein's affidavit.

THE COURT: His firstand original affidavit?

MR. DEAN: That's Exhibit E to Mr. Finkelstein's long affidavit.

THE COURT: Right.

MR. DEAN: In those pages, there are set forth alphabetically by writer, the songs of 21 of some of the most significant ASCAP writers, both living and dead, which were performed during the year '69.

To start just with the first one, alphabetically, Accentuate The Positive by Harold Arlen, and go to the first song of the second named writer, Alfie by Bert Bacharach.

If you then move on to Irving Berlin, we could go over his famous songs like Over There and Alexander's Ragtime Band, Be Careful, It's My Heart, Cheek To Cheek,

Easter Parade, God Bless America, so forth, or you could go to such distinguished composers as Aaron Copeland and George and Ira Gershwin, Oscar Hammerstein or Richard Rodgers or Alan Jay Lerner or Fredericke Loewe or JOhn Mercer or Jules Styne and Cole Porter.

You could list such songs as Oklahoma, Surrey With The Fringe On Top, and so forth.

But I merely want to emphasize that although they say tastes in music change and people differ about which music they like or the kinds of music they like, some people love the Beatle music, some people hate the Beatle music, but I just want to emphasize that I don't think you can compare them on the basis of numbers.

I don't think that in this application for this preliminary injunction, I just don't think that it can be decided on the basis of giving BMI some percentage of what the networks eventually work out with ASCAP and BMI.

Your Honor has already mentioned, yourself, that what the networks really want, whatever adjective they place on the method of payment, what they really want, what their directors of music have always said they wanted is the right, without wasting any time of going to people directly, of using any piece of music or any

bar of music, if you please, in the entire ASCAP repertoire.

Now, there is one big difference between ASCAP and BMI, and that is that the members of ASCAP reserve to themselves the right to license people directly.

THE COURT: In the membership agreement.

MR. DEAN: Yes. ASCAP has only a non-exclusive license, and the owners of the copyright who are members of ASCAP have got the right to enter into direct agreements, but BMI has exclusive licenses.

THE COURT: As a practical matter, do any ASCAP members enter into private negotiations?

MR. DEAN: Occasionally. Not very often. They have the right to do it. In the ASCAP articles of association, and according to the formula set forth in the consent decree, some of the more famous members of ASCAP have agreed to take a somewhat lesser rate of distribution, and that goes to the younger members in order to encourage them to be in there. But if they want to, they can enter into direct negotiations. I think what this essentially is, whatever form it eventually works out, it is an attempt by the networks to reduce the price that they pay ASCAP and BMI for the music that they use.

This is not the time to argue the antitrust aspects of it, but I think the antitrust aspects have been worked out for years with the Department of Justice and I don't read the Zenith-Hazeltine case in the same way that Mr Hruska does.

I would merely also like to point out that ASCAP has counterclaimed in this action against CBS, BMI, the plaintiff and also against NBC brought into the action as a counter defendant for violation of the antitrust laws based, among other things, on the monopoly power that these broadcasters exercise over the prime time of television stations in practically every important city in the United States and what we allege is their illegal attempt to use this monopoly power against independent writers and publishers of musical compositions.

So, the one major point that I want to make, which I have made, is the fact that we don't think that there ought to be this percentage between BMI and ASCAP.

There is one other matter that I don't quite know how occurred. In going through the papers submitted by CBS we discovered for the first time two days ago, your Honor, on Wednesday, to be exact, we saw a reference to this so-called in camera affidavit of counsel for CBS which we had not previously been aware of. We had not received

a copy. We had not had any notice of it. So, my partner, Mr. Steyer, called counsel for CBS protesting this procedure and we have now been given copies of these papers in camera. It seems to us that serving these papers in camera without notice to us was a violation of Rule 5 of the Federal Rules of Civil Procedure. The matter is now being adjusted and I hope procedures will be regularized

In summary, your Honor, I'd like only to emphasize that whatever your Honor considers to be his jurisdiction to grant the type of relief that is requested by BMI against CBS, it would be in this case completely inappropriate to measure that relief by a yardstick applicable to ASCAP. Thank you, your Honor.

THE COURT: Thank you, Mr. Dean. I would like to ask you this question: I clearly understand ASCAP's position as to BMI's proposal. Does ASCAP have a position as to CBS's offer, that is, to pay on a per use basis pendente lite?

MR. DEAN: We would want to work out our own method of compensation that CBS would pay us. What individual agreements they should make with BMI we don't think is any of our concern, except the fact that we don't think in this proceeding by BMI there ought to be any percentage relationship.

THE COURT: Very good. Thank you.

MR. TOPKIS: May I just have a minute, your Honor?

THE COURT: Yes.

MR. TOPKIS: My name is Jay Topkis of Paul, Weiss. We represent four individual songwriter defendants, your Honor, and I have a brief which has been served. May I hand it up to you? I can pleasurably assert to your Honor that it is the shortest piece of paper in this proceeding filed this morning.

THE COURT: I can feel that.

MR. TOPKIS: The only point I would add to what Ambassador Dean said, your Honor, is two points. First, so far as the desirability of BMI being paid for the use of its music, being songwriters, my clients are committed to seeing other songwriters paid for the use of their music, but we object most bitterly to any suggestion that since we are ASCAP songwriters that BMI is entitled to be compensated on the basis of a percentage of what is paid to ASCAP. Our reason for it, as Ambassador Dean said, is that we think we are producing Cadillacs and they are producing Fords.

But I could borrow from Mr. Shapiro's eloquent argument about the competition that is going on between

BMI and ASCAP today by calling to your Honor's attention that were you to issue an order saying BMI dererves 70 per cent of what ASCAP gets you might put it in the Federal Supplement but I assure you that BMI would put it in every trade paper going, and that is of critical urgency, your Honor, because w te it may be that at some point after due deliberation and full hearing on the facts, and the taking of all appropr e testimony, a court might be able to say that BMI's music in gross is worth a certain percentage of ASCAP's music, or that ASCAP's music in gross is worth a multiple of BMI's music, I respectfully suggest that it is impossible to make any such determination on even the pile of affidavits that has been submitted to your Honor here and I would call to your Honor's attention, to bolster my argument, the proposition that so far as I'm aware nothing in the copyright law or any other grant of jurisdiction to this Court empowers the Court to grant the utterly unprecedented relief in a copyright litigation of payments pendente lite. It has never been done. I don't think that there is a circumstance in which it should be done, and most emphatically.

THE COURT: Do you believe that there should be payment?

MR. TOPKIS: I think that we are let off that hook

by the fact that CBS has come forward and offered to make payment and I think something ought to be worked out between them, doubtless with your Honor's cooperation, but I would balk only at the idea that it should be set in terms of a percentage of what ASCAP receives.

THE COURT: Do you have any views as to CBS's proposal?

MR. TOPKIS: No, I do not, your Honor.

THE COURT: Finally, and maybe this is unkind to ask, I will ask is there anything different to be expected at least at the present time in the position of your clients and ASCAP in general in this suit?

MR. TOPKIS: I can't forecast for your Honor I can tell you that my clients --

THE COURT: It isn't because it was clearly seen ahead of time but just because your clients wanted their own representation?

MR. TOPKIS: That is right, but I can tell your Honor on occasion at least one of my clients has instituted litigation which took the position rather different from that which ASCAP --

THE COURT: I know that might happen, of course. For my own advantage, I guess, I'm trying to see whether I'm dealing with a three-headed monster or a four-headed

monster.

MR. TOPKIS: I think it might be about a 3 1 monster, your Honor.

THE COURT: Mr. Shapiro, do you have anything further?

MR. SHAPIRO: Speaking of monsters, your Honor, if BMI is the Frankenstein monster, I think I can figure out what CBS is -- Dr. Frankenstein.

Your Honor, I would just like to say one word about both Ambassador Dean's and Mr. Topkis's position. I understand very well -- it is an understandable reluctance of a competitor to give up a competitive advantage over another competitor that it seems to me impels their position here

THE COURT: I think it is a little more than that I think they not only object to the 70 per cent, but they object to the idea of the equation.

MR. SHAPIRO: Yes. On that, your Honor, I'm old enough also to prefer Irving Berlin to the Beattles; but I think that CBS should be considered the expert on the question of what is needed in today's competitive entertainment market, and CBS says that it is the BMI repertory that is necessary for its survival and --

THE COURT: They haven't said that ASCAP isn't

MR. SHAPIRO: No, they haven't

THE COURT: They have talked about BMI. We are dealing with BMI here.

MR. SHAPIRO: Yes, your Honor, but I think that the question of fungibility doesn't come up because while there is a different kind of music, perhaps, in the ASCAP repertory from that in the BMI, they are equally important, so that as far as CBS is concerned if they are equally important and 70 per cent of ASCAP's music is BMI's music, then that would appear to be an appropriate ratio for compensation.

But, on the more fundamental question, your Honor, of recruiting and the question of injury, Exhibit 1 to Mr Cramer's reply affidavit has an article from the Record World which is based apparently upon a news release by ASCAP which says:

"Paul Marks, Director of Operations for ASCAP, announces ASCAP's recruitment campaign for new members is paying off," and it goes on and names some newly-elected members, your Honor, who have madethe move to ASCAP. That means away from BMI, your Honor, and that is the problem. And as far as advertising is concerned, outside the Federal Supplement 11,000 advertisements such as Exhibit A to the Cramer affidavit are being proposed by ASCAP

CBS says that on the basis of their proposal they would have paid a million, seven hundred last year instead of what they say is a million, six hundred thousand. Our figures are that we were paid a million, three hundred thousand last year. But I would like to point one thing out: that in 1969 CBS had agreed to pay and paid, as I mentioned earlier, five million, six hundred thousand to ASCAP and in connection with that, during the United States v. ASCAP hearing in the transcript CBS said that that kind of premium that they were paying in paying that kind of sum to ASCAP was worth the avoidance of reporting problems, the record keeping, the avoidance of the accounting, the auditing and the disputes It doesn't seem that the per use approach would have the kind of benefit that CBS claims to have had in making this large lump-sum payment to ASCAP and it is that kind of disparity in treatment that is proposed by CBS that creates the danger to the existence of BMI here.

Your Honor, I would like to make one request and that is for permission to submit a affidavit on the payment schedule that CBS has alluded to in its papers.

THE COURT: All right. I would like to get those papers in, if I could, by the close of business on Wednesday.

MR. SHAPIRO: We will undertake to do that, your Honor.

MR. HRUSKA: Yes.

THE COURT: I think the, perhaps, pragmatic approach to this motion, particularly since there are responsible efforts being expressed on both sides to try to find a solution for it, would be for me to reach a tentative decision about the gross question about whether the Court has the right and power to do something and whether it is appropriate to approach this from one point of view or another, and then to meet with counsel just for discussion about what my advance views are to see if it can generate the possibility of something all of us agree to make sense for a while.

Let me put it this way: If I proposed to go the route suggested by BMI of a comparison to ASCAP, then it seems to me it would be proper for ASCAP perhaps to join in part of those discussions. Unless I propose to go that route -- I'm not trying to suggest one way or the other at the moment -- it doesn't seem to me necessary for ASCAP to join in those discussions. I say this to see whether ASCAP's counsel agree with that approach to the matter.

MR. DEAN: If your Honor please, there have been several statements that seem to us a misstatement of the facts and misstatements of the other cases. I would like in behalf of ASCAP therefore to be present, rather, when

anything is worked out. For example, in Mr. Cramer's affidavit in paragraph 21 he states that ASCAP has got people joining on the basis of making them sizable guarantees. We are prohibited from making guarantees. We haven't made them.

There were a number of other statements here this morning about the difference between a program and a per use type of license as to which I think we'd like to be heard in case they come up. Thank you, your Honor.

THE COURT: All right, thank you. Thank you, gentlemen.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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COLUMBIA BROADCASTING SYSTEM, INC.,

Plaintiff,

-against-

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al.,

Defendants.

69 Civ. 5740

REPLY AFFIDAVIT IN SUPPORT OF MOTION FOR PROMPT TRIAL OF LIABILITY ISSUES IN COMPLAINT

- -x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

AMALYA L. KEARSE, being duly sworn, deposes and says:

1. I am a member of the Bar of this Court and of the firm of Hughes Hubbard & Reed, attorneys for defendant Broadcast Music, Inc. ("BMI") and others in the above-entitled action, and am familiar with the facts and proceedings herein. I make this affidavit in support of BMI's motion for a prompt trial of the liability issues raised by the complaint herein.

2. In the conference held before this Court on March 25, 1971, counsel for CBS stated that it was conceivable that the CBS claims could be tried "at the end of the year, or at the end of the fall", assuming severance of the ASCAP counterclaims (Transcript p. 23; see also p. 24). Now, however, CBS responds to BMI's motion with a discovery program designed to take 15 months. Considering the nature of this planned deluge of discovery (discussed in BMI's memorandum submitted herewith), and considering some of the unnecessary discovery already conducted, it

appears that counsel's earlier estimate was the fairer.

3. CBS suggests that it will take the depositions of approximately 40 persons, averaging 4-5 days apiece. The first such person listed by CBS is ASCAP's General Counsel Herman Finkelstein whose deposition was commenced on April 14, 1971. We wish to bring to the Court's attention at this time what transpired at that session.

4. The deposition commenced at approximately 10:45 a.m. and continued until 5:15 p.m. with a luncheon recess. The transcript of the testimony is 170 pages long. More than 100 pages of this testimony apparently relate to CBS' proposition that it is essential to CBS to have licenses to use many if not all of the musical compositions in the ASCAP repertory. This in itself might not be cause for comment but for the fact that this proposition is admitted in ¶ 15 of ASCAP's Answer.

5. Nevertheless,[5] CBS re-established this proposition early in the day (Finkelstein Deposition Transcript 46-47):

> "Q. Let me ask you this. Is it true that large-scale users of copyrighted musical works would find it wholly impractical to deal with individual copyright owners to fulfill their requirements for music performing rights?
>
> A. I believe they would.
>
> Q. Is CTN a large-scale user?
>
> A. Oh, yes."

CBS then proceeded to elaborate on this conceded point, asking questions as to the geographical distribution of the ASCAP members (pp. 48-52), the size of the ASCAP repertory (pp. 52-61), the number of compositions added to the repertory each year (including questioning on the 1969 Annual Report issued by the

United States Register of Copyrights) (pp. 61-67), as well as the following questions which are some of those which consumed the last 70 pages of testimony: /6

[p. 107] "Q. * * * Is it true that no user of copyrighted music, including CTN, could ever hope to communicate with all the copyright proprietors whose property it desires to use?"

[p. 108] "Q. Is it true that CTN could not hope to communicate with all the copyright proprietors whose property it desires to use?"

[p. 109] "Q. Take the producer of the Ed Sullivan Show.

A. Yes.

Q. Could he hope to communicate with all of the copyright proprietors whose property he desires to use?"

[p. 110] "Q. How about the producer of the Merv Griffin Show, could he hope to communicate with all of the proprietors of copyrighted music that he wanted to use? * * *"

[pp. 111-12] "Q. Let us think about what a user like CTN would have to go through in order to do this, first in attempting to communicate with members of ASCAP, the member may be away from his regular address and there may be no way to reach him; is that true?"

[p. 116] "Q. Now when CTN or the producer of CTN programs attempted to communicate with ASCAP members for the purpose of licensing their music directly, that is, not through ASCAP, is it true that the member might not have the facilities to reply?"

[pp. 116-17] "Q. Do you think that this is an important point on the subject of the difficulty that CTN or the producers of its programs would have in attempting to communicate with ASCAP members regarding direct licensing?"

[p. 118] "Q. Do you know how many estates own interest in ASCAP compositions?"

[p. 119] "Q. Can we agree it is a substantial number of estates that have interests?"

[p. 120] "Q. Is it true, then, that all the problems for the user of locating and dealing with ASCAP members are compounded in the case of estates?

* * *

Q. Are there conflicting claims regarding the ownership of a substantial number of ASCAP compositions?"

[p. 123] "Q. Is the possibility of conflicting claims as to copyrighted musical compositions perhaps the reason for the desire of users to obtain indemnification?"

[p. 124] "Q. If you were a user attempting to license all of your music from ASCAP members directly, wouldn't you want an indemnification from the members who granted you licenses?"

[p. 125] "Q. You believe that it is the position of most users to want an indemnification from the people who are licensing music to them?

* * *

Q. Do you think it makes sense for a large scale user like a broadcaster, to obtain a flock of licenses to music, direct licenses from writers and publishers without receiving indemnifications from those writers and publishers?"

[p. 126] "Q. In the negotiations which would transpire between a broadcaster and writers and publishers of music, or between a program producer and writers and publishers of music, those negotiations to the extent they dealt with the subject of indemnification, would be more complicated than they would be had indemnification not been a subject of the negotiations?

MR. STEYER: What are you asking for now, a legal opinion or his judgment as a businessman, or what?

MR. HRUSKA: His judgment."

[p. 127] "Q. Mr. Finkelstein, let's assume that I am a producer of a television program and I hear a song on the radio and I like the song and I want to use it on my program, and I go to my musical director and I whistle the song for him and he likes it too. And neither one of us know the name of that song or who wrote it.

How would we go about finding out who the copyright proprietor of that song was?"

[p. 128] "Q. The question is, how do I go about finding out who was the copyright proprietor of that song."

[p. 129] "Q. It is true, isn't it, that musical directors or band leaders have the ability to orchestrate a piece of music once they hear the tune?"

"Q. * * * Is it true that direct licensing would be unworkable for CTN with respect to spontaneous broadcasts, such as the Merv Griffin Show?"

[p. 134] "Q. Is it also true that direct licensing would be unworkable for football games?"

[p. 137] "Q. Do you agree that clearly there is not enough time for CTN or the producers of CTN programs to approach either ASCAP or the member in interest and negotiate a license for such spontaneous or live performances?"

[p. 141] "Q. Is it true, Mr. Finkelstein, that direct licensing would be unworkable with respect to all programs filmed on the day of broadcast or taped on the day of broadcast or filmed or taped shortly prior to broadcast?"

[p. 142] "Q. Let's take a program like the Ed Sullivan program. Would direct licensing be workable for the Ed Sullivan program on the assumption that it is filmed or taped on the day of telecast?"

[p. 143] "Q.***If you were directing the affairs of CTN, Mr. Finkelstein, would you consider this a workable system, direct licensing for a program such as the Ed Sullivan program?"

[p. 144] "Q. What would it do to a musical variety program like the Ed Sullivan program to be confined in music uses to those compositions which could be licensed directly from writers and publishers?"

[p. 146] "Q.***Now I ask you, what effect would there be on a program like the Ed Sullivan program if CTN or the producers of that program were confined in the music used on that program to those compositions which they could license directly from ASCAP members?"

[p. 148] "Q. Were the detailed representations made in the Sipes affidavit regarding the difficulties that CBS would encounter if it did not have the unlimited right to use any composition in the ASCAP repertory or the BMI repertory, consistent with the statements in your earlier affidavit?"

[p. 149] "Q. Is it true that the portions of the Sipes affidavit, to which you refer on pages 7, 8 and 9, are consistent with the statements in your earlier affidavit?"

[p. 152] "Q. Do you agree that Sipes affidavit illustrates how the absence of a license from ASCAP would force CTN, in the operation of its network, to dictate which compositions may be performed and even to censor compositions already performed on prerecorded broadcasts?"

[pp. 160-61] "Q. Suppose CTN did not have any license from ASCAP at all. Would it be in the position of having to dictate which compositions may be performed on its programs and even to censor compositions already performed on prerecorded broadcasts?"

[p. 164] "Q. Do you believe that CTN or the producers of CTN programs could obtain rights to all the music they want to use, ASCAP music they want to use, on those programs, confined in their dealing to writers and publishers?"

[p. 165] "Q. Let us assume that CTN and the producers of CTN programs attempted to obtain licenses directly from ASCAP members. Would they be able, in such attempt, to maintain their current level of usage of ASCAP music?"

[p. 166] "Q. Even by spending more money, how would CTN and the producers of its programs obtain sufficient performing rights licenses from ASCAP to be able to maintain their current level of usage of ASCAP music?"

[p. 176] "Q. If CTB [sic] had no ASCAP license at all and persisted in not having an ASCAP license, it, too, in the long run would be injured?"

C/ 6. Not once during the deposition did ASCAP attempt to curtail this line of questioning even though it had conceded CBS' proposition both in its Answer and early in the deposition.

7. We believe it is clear that if this Court does not fix an early trial and require CBS to confine its discovery to relevant matters and matters which are in dispute, this

action could be drawn out indefinitely. /c

WHEREFORE, BMI respectfully requests that its motion in all respects be granted.

A. L. K.
Amalya L. Kearse

Sworn to before me this
26th day of April, 1971

Gerald B. Wald
Notary Public

GERALD B. WALD
Notary Public, State of New York
No. 31-4501450
Qualified in New York County
Commission Expires March 30, 1972

EXCERPTS FROM APPENDIX TO PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

COLUMBIA BROADCASTING SYSTEM, INC., Plaintiff, -against- AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al., and BROADCAST MUSIC INC., et al., Defendants.	(M.E.L.)
AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al., Defendants-Counterclaimants, -against- COLUMBIA BROADCASTING SYSTEM, INC., Plaintiff-Counterdefendant. NATIONAL BROADCASTING COMPANY, INC., Counterdefendant.	69 Civ. 5740

APPENDIX TO PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

August 16, 1971

CRAVATH, SWAINE & MOORE,
Attorneys for plaintiff,
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HAnover 2-3000

ALAN J. HRUSKA,
J. BARCLAY COLLINS,

Of Counsel.

IN THE

United States District Court

FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

TEMPO MUSIC, INC., ET AL., *Plaintiffs,* *vs.* INTERNATIONAL GOOD MUSIC, INC., *Defendant.*	CIVIL ACTION No. 5548
IRVING BERLIN, ET AL., *Plaintiffs,* *vs.* INTERNATIONAL GOOD MUSIC, INC., *Defendant.*	CIVIL ACTION No. 5773
COLE PORTER, ET AL., *Plaintiffs,* *vs.* ROGAN JONES and INTERNATIONAL GOOD MUSIC, INC. *Defendants.*	CIVIL ACTION No. 242 (Bellingham)
GERSHWIN PUBLISHING CORPORATION, ET AL., *Plaintiffs,* *vs.* K-91, INC., *Defendant.*	CIVIL ACTION No. 5771
IRVING BERLIN, ET AL., *Plaintiffs,* *vs.* WESCOAST BROADCASTING CO., *Defendant.*	CIVIL ACTION No. 2258

BETTY COMDEN, ET AL., *Plaintiffs,* *vs.* WESCOAST BROADCASTING CO., *Defendant.*	CIVIL ACTION No. 2415

Memorandum Opinion

SOLOMON, JUDGE: September 15, 1964

Irving Berlin, Richard Rodgers, Cole Porter and other owners of copyrights to more than 150 musical compositions, including such well-known songs as "White Christmas", "Easter Parade" and "Day and Night", filed actions against three radio broadcasting corporations and Rogan Jones, the president and principal stockholder of one of them, claiming violations of the federal copyright law. They seek statutory damages, orders enjoining defendants from future infringement of their copyright works, as well as attorney fees and costs.

Defendants admit the expropriation and the infringement of plaintiffs' copyrights, but they assert that plaintiffs are barred from maintaining this action because, among themselves and in conjunction with the American Society of Composers, Authors and Publishers (ASCAP), plaintiffs have conspired to fix prices and to engage in other unlawful practices in violation of the Constitution and the laws of the State of Washington, particularly Chapter 218, 1937 Session Laws (RCWA, Chapter 19.24) and the federal antitrust laws. Defendants also assert that plaintiffs have unlawfully extended their individual copyright monopoly in violation of the copyright laws, and that by reason of "unclean hands" they have neither

legal nor equitable standing to maintain these actions.

Defendants at an earlier stage of these proceedings, before a different Judge, moved to join ASCAP as a party. The motion was denied. However, the defendants assert that while ASCAP may not be a necessary party, its activities are relevant because it acts as a licensing agent for the plaintiffs and because of plaintiffs' illegal arrangements with it.

Plaintiffs are among 8800 members of ASCAP, whose combined inventory of over one million musical compositions is commonly referred to as the ASCAP repertory. The relationship between ASCAP and its members, as well as the operations of ASCAP as a licensing agent of the members, has been under the scrutiny of the United States Department of Justice for more than a decade. Its practices are guided by the Amended Final Decree of 1950 and the order entered in the same action on January 7, 1960. All of the plaintiffs granted ASCAP a non-exclusive right to license non-dramatic performances for profit of their copyrighted compositions.

Under the terms of the Amended Final Decree, ASCAP may not license the use of the individual compositions except on application of both user and copyright owner and ASCAP may not refuse to license prospective users of compositions from its repertory. In case of disputes concerning license fees, the Amended Final Judgment provides for judicial determination of reasonable fees in the United States District Court for the Southern District of New York.

Plaintiffs have reserved the right to license their own compositions to any user on any mutually agreeable basis,

and in these cases the plaintiffs as individuals seek to enforce their copyrights.

Most of the evidence in this case was stipulated in a long and carefully prepared pre-trial order. I have studied the statement of admitted facts, the evidence adduced at the trial, the exhibits, as well as the excellent memoranda of authorities submitted by both the plaintiffs and the defendants, and I have concluded that the plaintiffs are entitled to prevail.

I had hoped to prepare a written opinion setting forth not only my reasons for such conclusion, but also an analysis of the authorities upon which I relied. However, illness as well as the press of other judicial business has prevented me from doing this. I believe that the interests of the parties will be served best by announcing my decision without further delay. I also concluded that such an opinion would be of limited value because there are practically no controverted issues of fact and because both plaintiffs and defendants are represented by competent counsel who will present adequately their arguments to the Court of Appeals.

I find that plaintiffs have complied with the statutory requirements of the State of Washington. Defendants have failed to prove that ASCAP's registration of the songs in its repertory was inadequate or that plaintiffs or ASCAP violated the Washington law relating to the pooling of copyright interests without providing for per piece licensing (RCWA 19.24.020); or that the filing of these and other actions by the plaintiffs to enforce their rights under the copyright laws constituted an abuse of either State or Federal process. There is no evidence of any

abusive practices by either the plaintiffs or their licensing agent which would deny them copyright protection.

I further find that there is no merit in defendants' contention that they did not take licenses with ASCAP because they feared State prosecution. I find that they failed to take licenses only because they wanted to avoid paying license fees on the same basis charged other broadcasting companies. I further find that defendants made no attempt to contact plaintiffs individually for the purpose of obtaining licenses to play plaintiffs' songs on a per piece or any other basis.

Defendants have admitted that it would be virtually impossible to deal with the composers on an individual basis for the rights to perform their songs for profit. Their contentions as to what the law requires would not only make it virtually impossible to police the use of copyrighted songs, but would also greatly increase the cost of administration. The enforcement of the Washington statute, as construed by the defendants, would not only jeopardize the efficient licensing and policing of performance for profit, which can only be done by licensing organizations such as ASCAP, BMI or SESAC, but it would also deprive plaintiffs and all other copyright owners of the privilege of profiting from their federally granted copyright monopoly.

To construe the provisions of the Washington statute (RCWA, Chapter 19.24) so as to make the acts of the plaintiffs or ASCAP in this case unlawful would raise grave questions concerning the constitutionality of the Washington statute under the Fourteenth Amendment to the Constitution of the United States.

Plaintiffs have not unlawfully extended their copyright monopolies through a combination among themselves or with ASCAP, nor are they guilty of violating the federal antitrust laws in any respect alleged by the defendants. However, even if plaintiffs' conduct in any respect can be considered a violation of either RCWA, Chapter 19.24, or the federal copyright or antitrust laws, their violations are so minimal and the violations of the defendants so unconscionable that plaintiffs should not be deprived of the right to maintain these actions for the deprivation of their property.

I also find the defendant Rogan Jones, who is and has been the dominant influence in defendant International Good Music, Inc., and who has determined its policies for more than 25 years, is equally liable with the corporation for these infringements.

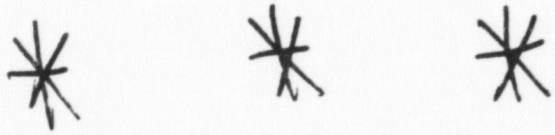
In accordance with Section 101 of the Copyright Law (17 U.S.C.A Sec. 101), plaintiffs have elected to seek statutory damages in lieu of actual damages and profits. For the violation of each copyright, statutory damages not exceeding the sum of $5,000 nor less than $250 may be assessed. Defendants have deliberately appropriated the property of plaintiffs as well as the property of many other copyright owners for more than a quarter of a century, and they have greatly profited by their wrongful conduct. The conduct of International Good Music, Inc., and its president Rogan Jones has been particularly flagrant. However, I have decided to fix damages for each violation at only $350.00 jointly against defendant International Good Music, Inc., and Rogan Jones. I have decided to fix damages against Wescoast Broadcasting Co. and K-91, Inc., for each violation at $250.00.

The prevailing parties are also entitled to attorney fees as part of costs. The parties stipulated that I may fix the fees without taking testimony. I realize that plaintiffs' attorneys will charge much more than I will allow them and that they are entitled to such higher fees. Although $15,000.00 is a modest fee to allow plaintiffs in all of the consolidated cases, I will allow that amount. It may be allocated among the cases in accordance with the amount of statutory damages allowed in each case.

Plaintiffs are also entitled to an injunction restraining the defendants from future infringement of plaintiffs' copyrighted songs.

Defendants' counterclaims are dismissed.

Counsel for plaintiffs shall prepare appropriate findings of fact, conclusions of law and a judgment for plaintiffs, all in accordance with this memorandum opinion.



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

COLUMBIA BROADCASTING SYSTEM, INC.,	:	
Plaintiff,	:	(M. E. L.)
-against-	:	69 Civ. 5740
AMERICAN SOCIETY OF COMPOSERS AUTHORS & PUBLISHERS, et al.,	:	
Defendants.	:	

REPLY MEMORANDUM

PAUL, WEISS, RIFKIND, WHARTON & GARRISON
Attorneys and Counsellors At Law
345 Park Avenue, New York, N.Y. 10022

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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COLUMBIA BROADCASTING SYSTEM, INC.,

Plaintiff,

-against-

AMERICAN SOCIETY OF COMPOSERS, AUTHORS & PUBLISHERS, et al.,

Defendants.

(M. E. L.)

69 Civ. 5740

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REPLY MEMORANDUM

In an effort to avoid the impact of the K-91 decision, CBS purports to find in ASCAP three continuing antitrust vices. According to CBS: (a) the ASCAP "combination" allegedly deprives CBS of the "competitive market" that would exist if ASCAP's 17,500 members "competed" among themselves to have their compositions played by CBS; (b) ASCAP, despite the clear provisions of Section IX of the Amended Final Judgment, allegedly "fixes prices"; and (c) although ASCAP acquires only non-exclusive rights from its members, it nevertheless somehow furthers an unlawful boycott because it "prevent[s] users from dealing directly with its members."

But it is clear from CBS' answering papers that:

(a) the last thing in the world CBS wants is the "competitive market" whose virtues it extols in its answering papers; (b) the "per-use" license which CBS claims the antitrust laws require ASCAP to issue would itself be a price-fixing scheme; and (c) CBS' claim of boycott is based on faulty logic and a misapprehension of the facts.

What CBS really seeks here is a judicially-approved means of coercing ASCAP's members (and the writers and publishers who now clear through other licensing organizations). It wants ASCAP to exist -- on CBS' terms -- so that it can obtain from ASCAP a fixed price ceiling, per composition, which it can then use to extort a lower price from individual composers. And when it is too lazy or busy to thus "negotiate" with an individual ASCAP member for a lower price, or when it needs a work that has unique value for a particular use, it wants to be able to resort to the fixed-price, "per-use" license from ASCAP.

In short, CBS demands the great convenience and economic advantage of blanket access to the entire ASCAP repertory, but it wants to pay for this right of access, the "library card," in a manner which would give it an economic weapon to cudgeon ASCAP's members into accepting lower prices and to make pawns of the writers and publishers in the CBS network game.

That, we respectfully suggest, is not the "competition" envisaged by the framers of the Sherman Act.

A. The "Competitive Market" Argument

CBS argues that ASCAP is a "combination" which suppresses competition among its 17,500 members. If that combination did not exist, argues CBS, these members would compete with one another and provide CBS with a "competitive market." And, the argument runs, the antitrust laws entitle CBS to such a "competitive market."

On that reasoning, however faulty it may be,* the appropriate remedy would be the dissolution of the combination. There would be no clearing house to which CBS could turn to satisfy its needs; and CBS would engage in individual "negotiations" with ASCAP members for individual licenses. (CBS' other options would be not to obtain licenses and be an infringer, or to stop playing any music that is cleared through a licensing organization such as ASCAP.)

But CBS repeatedly makes it clear that this is not

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* CBS' reasoning is faulty, among other reasons, because its notion of a "competitive market" appears to be one in which there are many sellers on the one side and CBS, a pool of, and purchasing agent for, 200 owned and affiliated stations as the single buyer on the other side.

the "competition" it wants. On the contrary, CBS acknowledges that it wants and needs blanket access to the ASCAP repertory (and other repertories) -- that at least a very large proportion of its music needs could not be met by licenses obtained directly from individual composers and publishers.

CBS, itself a "combination" of nearly 200 owned and affiliated stations, thus wants ASCAP (and CBS' own creature, BMI) to continue to exist, but it wants them to exist on CBS' terms.

Its incantation of the slogans "combination" and "competitive market" therefore adds nothing to the analysis; they are mere verbiage.*

B. The Price-fixing Argument

CBS' major antitrust attack upon ASCAP is the claim that ASCAP "fixes prices." In answer to the Ninth Circuit's holding that ASCAP does not fix prices because it has no power to fix prices, CBS argues that the real evil lies in the fact that ASCAP establishes "within its own ranks a uniform system

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* The Ninth Circuit put the matter properly when it said, in K-91: "ASCAP is certainly a combination but not every combination is a combination in restraint of trade or a monopoly." 372 F.2d 1, 4.

of payments to members for all compositions in its pool."* (CBS Memo, p. 3)

While it is difficult to understand how ASCAP's method of distributing its income to its members is a price-fixing scheme, one thing is clear: nothing in the distribution system would change under a "per-use" license (or at least CBS does not suggest anything would change). ASCAP's members would continue to receive distributions commensurate with the use of their music.

One thing, however, would change under a "per-use" license. CBS would obtain an economic club over the heads of ASCAP's members.

Under its "per-use" scheme, CBS would have ASCAP agree to a fixed license fee for every composition "depending upon the nature of the use" (but not on the nature of the composition). (CBS Memo, p. 8) CBS would thus pay the same fee ("depending upon the nature of the use") for a current hit or popular standard that it would pay for some little

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* CBS says that the problem with a Section IX proceeding is that the rate there determined is for the entire "package." CBS ignores the fact that the licenses ASCAP is required to offer under the Amended Final Judgment (blanket and per program), are licenses which give access to the entire repertory, i.e. the "package" and that ASCAP is explicitly precluded by the Amended Final Judgment from entering into licenses for individual compositions unless the user and the member-in-interest so request.

known composition in the ASCAP repertory. CBS would then be free, it argues, to "deal with copyright proprietors directly without paying twice for the same rights." (Id.)

The hypothetical "bargaining" CBS would engage in with individual copyright proprietors is not very difficult to imagine: Assume the per-use fee agreed upon is $100 per use. CBS would then go to an individual copyright proprietor and demand a lower price and suggest that if he wanted to have his music played on CBS, it would be to his advantage to quote CBS a lower price. The individual ASCAP member would then have the following alternatives: he could "negotiate" with CBS by capitulating to its demand for a lower price, or he could take his chances that his music might find its way on the air, for CBS controls the prime time on its stations. He surely could not "negotiate" with CBS for a price higher than the ASCAP "per-use" fixed price.

CBS on the other hand, would have the following alternatives: if it could not extract a lower price from the member, but if "competitive" conditions vis-a-vis other networks or stations, or if the unique spot filled by the composition on a program, dictated that CBS use the composition anyway, it could always fall back on the ASCAP "per-use" license.

CBS in other words would have its cake and eat it

too. It would never be precluded from using ASCAP music, but with its economic power as a substantial user of music,* it could force ASCAP members to offer it lower prices than the rates fixed in the ASCAP "per-use" license.

The per-use license, in short, is nothing less than a mechanism for fixing maximum prices.

Indeed, CBS itself declares, perhaps unwittingly, that the per-use license would be a price-fixing system per se violative of the antitrust laws. In elaborating its theory that ASCAP fixes prices by its distribution system, CBS explains:

> "The most transparent method by which the [ASCAP] combination could fix prices would be for its members to agree to charge television networks a stipulated dollar amount (e.g. $100) for each prime time feature use, irrespective of the song used. . . "
> (CBS Memo, p. 31)

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* CBS appears at times to argue that ASCAP has far greater bargaining power than its licensees, who allegedly must capitulate to its demands. We do not know to which licensees CBS is referring - surely not CBS or the other networks whose financial resources and economic power in the marketplace easily surpass those of ASCAP. As to local radio and television stations, whenever they have had to negotiate licenses with ASCAP, they have banded together in all-industry committees. In any event, the two weapons which hypothetically might give ASCAP an undue bargaining position are simply not there: under the terms of the Amended Final Judgment, ASCAP may not refuse to give any user a license, and this Court is always standing by to fix a reasonable fee if the user and ASCAP are unable to agree on a fee. Moreover, in any such proceeding, the burden is on ASCAP to show the reasonableness of the fee it requests.

But this is the very scheme CBS demands in this action. What else has CBS just described but a "per-use" license.

CBS' price-fixing arguments are frivolous. The Ninth Circuit in the K-91 case properly dismissed the contention that ASCAP is guilty of price fixing, and that ruling should be followed here.

C. The Boycott Argument

CBS' claim that ASCAP furthers an unlawful boycott because it interferes with direct negotiations between users and individual ASCAP members ignores the fact that ASCAP acquires from its members only the non-exclusive right to license public performances for profit of its members' copyrighted compositions.

CBS argues, however, that a broadcaster's right to negotiate directly with ASCAP's members is more apparent than real because under the licenses offered by ASCAP, a broadcaster "is forced to license the entire pool and receives no deduction from the fee on account of any music licensed directly from ASCAP members." (CBS Memo, p. 12.)

This argument simply overlooks the facts. For example, in the form of per-program license now existing between

ASCAP and local broadcasters, if the local station acquires performance rights directly from the ASCAP member for the ASCAP music on a particular program, it is not required to pay license fees to ASCAP on programs using that music. Local stations thus either acquire rights from individual ASCAP members for the ASCAP music on a program or they pay under ASCAP's "per-program" license.

In any event, since CBS has not come forward with any proof that it has ever sought to deal with individual ASCAP members directly, its claim of boycott is obviously the product of someone's imagination -- and has nothing to do with any facts CBS has adduced.*

* * *

Unable to find any facts to support its claims, CBS seeks to dismiss the K-91 decision as an aberration in the law and tries to find the applicable law instead in cases decided

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* We should note parenthetically that insofar as CBS purports to find in Mr. Finkelstein's deposition support for its claim that a broadcaster could not fulfill its requirements by dealing directly with ASCAP members, it has quoted from the deposition out of context. For Mr. Finkelstein made it clear that if a broadcaster wanted to pay the cost, it could obtain all the music it wanted or needed directly from ASCAP members. The thrust of Mr. Finkelstein's testimony was that ASCAP served as a great convenience for CBS and other users. (Finkelstein EBT, pp. 500-02, 532, 537)

before the entry of the Amended Final Judgment in 1950, particularly cases involving ASCAP's relations with motion picture exhibitors (Alden-Rochelle, Inc. v. ASCAP, 80 F.Supp. 888 (S.D.N.Y. 1948) and M. Witmark & Sons v. Jensen, 80 F.Supp. 843 (D. Minn. 1948)). CBS contends that: "Nothing has changed since that time." (CBS Memo, p. 14)

But as the Second Circuit pointed out in Shenandoah Broadcasting, Inc. v. ASCAP, 331 F.2d 117, 121 (2d Cir. 1964), cert. denied, 371 U.S. 997 (1964):

> "The Amended Final Judgment of March 14, 1950, considerably amplified an earlier consent judgment entered in the Government's antitrust suit against ASCAP nine years before. The 1941 judgment contained many negative injunctions with respect to licensing, but had no provision specifically addressed to television, which had not yet been developed commerically, and no provision for judicial fixing of license fees if a licensee and ASCAP were unable to agree on terms. The 1950 Judgment was designed, in part, to fill these gaps, as well as to meet the problems with respect to motion picture licensing revealed by Alden-Rochelle, Inc. v. ASCAP, 80 F.Supp. 888 (S.D.N.Y. 1948) and M. Witmark & Sons v. Jensen, 80 F.Supp. 843 (D. Minn. 1948)."

In recognition of the changes thus wrought by the 1950 Judgment, we may note, Judge Leibell vacated the injunctive order which he had entered in Alden-Rochelle.

In consequence, Alden-Rochelle and Witmark are of

only historical interest today. Neither is of any pertinence here.

CONCLUSION

[redacted]otion for summary judgment should be granted.

New York, New York
September 3, 1971

Respectfully submitted,

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Of Counsel:

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wss

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

COLUMBIA BROADCASTING SYSTEM, INC., Plaintiff, vs. AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al., Defendants.	69 Civ. 5740

Before:

HON. MORRIS E. LASKER,

District Judge.

New York, September 14, 1971;
10.00 o'clock a.m.

APPEARANCES:

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Amalya L. Kearse, Esq.,
George A. Davidson, Esq., of Counsel.

(Case called.)

THE COURT: Good morning everyone.

MR. RIFKIND: For the motion, may it please the Court.

This motion, which you granted us leave to argue this morning, was first made on behalf of the defendants, Si Coleman, Arthur Hamilton, Arthur Schwartz and Ned Washington. It has since been adhered to by defendant, American Society of Composers, Authors and Publishers and I shall speak on behalf of both the Society and the individual defendants.

THE COURT: Your firm represents them all?

MR. RIFKIND: We now represent them all.

This is a m otion, as your Honor knows, for summary judgment in favor of the defendants I mentioned on the ground that there are no triable issues of fact and that the defendant is entitled to judgment as a matter of law. The rule from which we derive our motion is, of course, Rule 56.

Should this motion, your Honor, find favor in your eyes and prevail, it will obviously save an enormous amount of judicial time and effort.

THE COURT: It tempts me greatly, Judge Rifkind, for that reason.

MR. HRUSKA: It tempts me too, your Honor.

MR. RIFKIND: I hope the temptation will turn out to be a temptation to virtue as I shall try to demonstrate.

But because I think it has the possibility of so substantially reducing the amount of judicial time and effort necessary for this case I take the liberty to suggest that your Honor allot time generously, both for the advocacy and the resistance to this motion.

THE COURT: Oh, yes. I regard it as a serious motion. Don't be concerned about that. I have already spent a good deal of time reading the very interesting papers and I expect to devote the whole morning to it if that is necessary.

MR. RIFKIND: Thank you, your Honor.

In truth I would have to say that the case presents a rather simple story and that the complexities which surround it are man-made. Perhaps to be more professional I should say lawyer-made. They do not arise

out of the inards and intricacies of the transaction itself, that is what I mean.

Now, your Honor will observe an unusual and perhaps an unorthodox feature of the motion and the unorthodox feature is that neither side on this motion for summary judgment has submitted any affidavits. I must confess, sir, that is rather novel in my experience. And this concurrence, your Honor, is not the product of agreement between the moving party and our adversary. It has significance, I think.

This calculated omission of affidavit material recognizes and acknowledges a fact which I think can be judicially noticed that for over 30 years ASCAP has lived in a fish bowl and that is every act has been open to view and its every move has periodically been subjected to review by some judicial authority.

In this fish bowl ASCAP and the plaintiff have lived together. I shouldn't like to use the word cohabited; perhaps coinhabited the fish bowl would be more accurate. They have lived in a kind of symbiotic relationship, which, according to the dictionary, means a mutually advantageous association although at times, I must admit, that like a good marriage it was disturbed by acrimony and disagreement.

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Of the 30 years I have mentioned, or more, certainly for the last 20 years, nothing materially has changed in the constitutional arrangements, in the organic arrangements of the Society in relationship to its members and in relationship to its users or customers or clients, except that recently plaintiff acquired new counsel, and in accordance with tradition in the ASCAP situation, which you will find confirmed by reference to the history of this long judicial relationship with ASCAP, that occasion invariably involves a new round of litigation in the courts.

So it was no surprise when new counsel, having been assigned to this case, incidentally exceedingly able and sophisticated counsel, that a new complaint would be filed of some kind of character; and we have it. This complaint is new but not novel. It is exceptionally well embroidered and even perfumed with the snythetic scent of sweet reasonableness.

But, your Honor, if you just hold that complaint steady for a while and let the breeze clear away the scent and let the sequins subside so they won't shimmer in the sunlight you will find the same old cliches with respect to ASCAP as if we were living in the pre-1940 era. ASCAP is a conspiracy; its catalog is a pool; it is engaged in boycotts;

price fixing, all words, words that were once used, that once may have had content but which today are empty labels signifying nothing. And in the course of my argument I shall try to persuade your Honor that these are indeed words and only words and that this vast array of talent and this assemblage of all the king's horses and all the king's men do not make a real situation out of what is nothing but a verbal construction.

And I say to your Honor in introduction that this complaint should be dismissed for the same reason that a $3 bill is rejected in trade. It is counterfeit. It is not a genuine claim either under the antitrust laws, under the copyright laws or any other laws known to American jurisprudence. The rhetoric may be novel but novelty isn't enough to give a complaint substance.

If I may indulge a reference to the ancient little story about the traveling salesman of counterfeit bills who found his saddle case loaded with $18 bills. He thought this was a novelty that ought to be taken to the mountain folk in Appalachia.

wsh 1

But when he approached the first denizen of that supposedly benighted community, the gentlemen he addressed looked at it and said, "Very interesting, very novel indeed, would you like it changed into six $3 bills or three $6 bills?"

I would like to question the plaintiff's good faith, not that of its counsel, in making the claim that it is making in this complaint. Why do I challenge its good faith? Because I like to take each allegation in turn and inspect it and compare it with the relief that is being sought.

It alleges that ASCAP is a conspiracy. Does it ask for dissolution of that conspiracy? It does not. It asserts that the ASCAP catalogue is a pool. Does the complaint ask for the dismemberment of that pool? It does not. The complaint alleges that the rate structure of ASCAP is the product of price fixing. Does it ask for an injunction against price fixing? It does not.

On the contrary, if I read the complaint correctly, and being a case involving music I can almost hear the tune. The plaintiff says "I can't live without you" so please let's not dissolve ASCAP. And "what will I do without" the ASCAP catalog? We must maintain it intact. And interestingly enough the plaintiff wants prices fixed but he wants it fixed his way. The ambition to have prices fixes his way has been enshrined in hundreds of stories by generations of writers who derive their

wsh 2

style from the school of Boccaccio. On the issue of the plaintiff's good faith, when CBS, the plaintiff in this case became one of the fouding fathers of another defendant in this case, to wit, BMI, it inaugurated a licensing system which in every relevant detail parallels the ASCAP arrangements; that is there is a conspiracy and there is a pool and there is a per program license and there is a blanket license and the prices are fixed by reference to a percentage of revenues derived from time on the air.

Let us look at the complaint in somewhat greater detail -- not too much. The complaint alleges that ASCAP and its operations violate Sections 1 and 2 of the Sherman Act and by reason thereof they seek a variety of injunctive relief. It also alleges that the defendants are misusing their copyrights and it asks for a declaratory judgment to that effect.

The heart of the complaint, your Honor, I think can be found in two paragraphs of the complaint. Paragraph 9, if I may quote it, "The aforesaid agreements and combinations among ASCAP members and ASCAP" -- I will omit reference to BMI for this purpose-- "constitute, A, restraints of interstate trade in the licensing of nondramatic performing rights of musical compositions which are unlawful under Section 1 of the Sherman Act and B, monopolizations of the nondramatic

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performing rights of the copyrighted music in the ASCAP pool which are unlawful under Section 2 of the Sherman Act."

There is the crux of the allegation as far as the Sherman Act is concerned. And the next one is paragraph 19. "Each licensing society has conditioned the grant of a performing right license to copyright music in its pool upon the payment by plaintiff of royalties measured by total time charges for programs in which none of that society's copyrighted music or indeed no music or the copyrighted music of another licensor is used and upon the payment of the same royalties per program using only a single copyrighted music composition as for a program using many compositions." Each licensing society is therefore using the leverage inherent in its copyright pool to insist that plaintiff pay royalties on a basis which does not bear any relationship to the amount of music performed. Such insistence by ASCAP constitutes misuse by it of the copyrights in their pools.

So there you have the two major allegations. But if you look at the prayer for relief, as I have already indicated, A, wherefore plaintiff demands judgment directing ASCAP to grant plaintiff licenses for its television network programs to perform copyrighted music in its pool on payment of reasonable royalties measured by actual use of such music on those programs. And then if I would read C,

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declaring that defendants have misused as against plaintiff the copyrights of musical compositions in the ASCAP pool.

You will observe what I said before that there is no demand for the dissolution of the licensing society, no demand for the dismemberment of the pool, no demand for an injunction against price fixing, tying or boycotting but directing a mandatory injunction, directing ASCAP to grant a license which would allow the plaintiff to have unlimited access to the pool in return for royalties measured by actual use.

Indeed, the mandatory injunction contemplates the continued existence of the pool, ASCAP and the fixed price.

The nature of the plaintiff's grievance is spelled out a little more fully in a letter which is annexed to the complaint and a small part of it may be useful to quote. This is a letter addressed to ASCAP by CBS and I will quote just a few lines. "We believe that the current licenses are unfair to CBS because they obligate us to pay for music we do not use and that it would be illegal for you to continue

b3 to impose their provisions upon us against our wishes." It says those licenses now compel CBS to pay a percentage of its time charges to CBS advertisers irrespective of the extent to which CBS uses ASCAP music. It says CBS is forced to pay royalties on programs which do not use music at all.

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It says CBS is also required to pay the same percentage of time charges for a program that used ten seconds of one ASCAP musical composition as for a program that uses 30 minutes of 15 ASCAP compositions.

And they say they feel strongly that these are unfair. "We are quite prepared to consider a rate structure reflecting the relative values of different uses of music. For example, you might wish to offer per minute rates based on the time of day during which the music is performed and also on the different uses to which the music is put for future performance, background performances and performances in commercial announcements."

You will observe there is no word about the quality of the composition, the reputation of the composition, the standing of its composer, any of those elements; only its length, number of performances, time of day, whether foreground or background.

Now, your Honor, I will say to you that the allegations I have read from the complaint and the allegations I have read from the letter are sham, false, without support in either life or law, do not represent the relations between the plaintiff and the defendant, ASCAP, and to the demonstration of that I willnow turn.

First I think we should give you a little history. The circumstances which brought ASCAP into being, your Honor,

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have been recited so often that it would be presumptuous of me to repeat them here and I shall take it that your Honor is fully familiar with that often recited tale. They are the same kind of circumstances which have generated music licensing societies in every western civilized nation in the world. It was out of the necessity of that situation, with which your Honor is familiar, that ASCAP came into being in 1914. And I don't think it takes an enormous talent for prophecy to say, your Honor, that had it not been formed in 1914, by the time radio came into general use as an entertainment medium, it would have had to be invented and if the authors, composers and publishers, if they hadn't invented it, I would say that CBS and NBC would have forced it to come into being.

And because of these necessities of the situation we have the historic fact that since the year 1926 CBS has been a licensee of ASCAP. Now, what are the present arrangements which govern? ASCAP is, as alleged, a society of thousands of authors composers and publishers and ASCAP is possessed of a non-exclusive license, a non-exclusive license to sublicense the non-dramatic public performance rights to a vast number, more than a million compositions. But it is fatuous your Honor, fatuous to stop here as if nothing else had happened to ASCAP, and I suspect that that is

exactly the way the people who wrote this complaint look upon it, as if ASCAP was just what I have described and nothing more. If that were all it might be argued that such a combination as I have described had power to restrain trade. It might be argued that such a combination had the power to fix prices and the power to boycott both suppliers and customers. But such an ASCAP possessed of those powers does not exist in life today and hasn't existed for over 30 years; and most certainly not for 20 years has it possessed a shred of any of the powers that I have just mentioned, certainly not since the last decree in U.S. v ASCAP went into effect.

As an unrestrained combination it might have restricted the supply of music by excluding disfavored composers and publishers from its ranks. Thereby it would confer an advantage on its own members and a disability upon non-members and you might have called it a boycott.

Under the decree that power has been withdrawn both by law, as it has been by the decree, and it has been cancelled in fact by the creation of BMI.

As your Honor knows, under that decree, every composer may join the ranks of ASCAP if he has written one song.

As an unrestrained combination ASCAP might have exerted power in the market by giving an advantage or a disadvantage

to some customers against others. If ASCAP had the power to grant a license to NBC and to withhold it from CBS, it might well cause our antitrust hackies to rise. But under the decree any prospective user, and you can underscore any and put it in italics and put it in caps, any prospective user is licensed by merely asking for a license. He doesn't have to arrive at an agreement; he doesn't have to agree to pay a fee; he doesn't have to pay a deposit. He says, "Give me a license", and thereby he is licensed even if his letter is never acknowledged in the mails.

As an unrestrained combination ASCAP might have given preferred rates to one user as against another and thereby causing injury to the unfavored one. But under the decree that is impossible. The rates must be uniform to users of the same kind and non-discriminatory in character. As an unrestrained combination perhaps ASCAP might have been arbitrary, exhibit a take it or leave it sort of an attitude, but under the decree ASCAP must offer a genuine choice to the prospective user.

THE COURT: What is the choice?

MR. RIFKIND: As between per program and blanket.

THE COURT: That is all the decree requires?

MR. RIFKIND: That is all the decree requires. Just so I don't forget to say it later, all the

decree requires is the tender of a per program license. If a per program license is tendered, then ASCAP may arrange, with a willing licensee, for a blanket license.

An unrestrained combination might have imposed high and unfair prices. Under the decree it cannot do so because it is not the judge of its own price. It may suggest a price. It then has the burden of proving that it is reasonable and fair and the court decides whether it is or it isn't. The decree even governs its relation with its members and how its funds shall be distributed to them.

I would say to your Honor that there is no freer, no less trammeled noless arbitrary market in the universe, indeed than any universe even if it had been created by Adam Smith himself. But the plaintiff says the very existence of ASCAP has an effect on the market. Its very being has such an effect and indeed it does, your Honor. The effect of it on the market is that it makes CBS viable as an entertainment seller. It makes CBS' appetite for music manageable. But for ASCAP, certainly before BMI came into being, CBS could not have operated in music the way it does.

So it confesses in its own complaint, so it confesses in its own brief. It is because it recognizes this relationship of ASCAP to the satisfaction of its requirements, that, I assume, is the reason why CBS asks for the continuance

of ASCAP. If ever there were a set of facts, your Honor, to which the language of the Ninth Circuit Court of Appeals is applicable, this is it. You remember the Ninth Circuit said ASCAP is certainly a combination but not every combination is a combination in restraint of trade or a monopoly; and it found ASCAP is not in restraint of trade or a monopoly.

We might add, to follow the Ninth Circuit example, ASCAP's catalog is certainly a pool but it is an unrestricted unsegregated in use; and all can swim in the pool regardless of race, creed or color and all may contribute to the water of the pool, any author, composer or publisher.

Now, against the background of what I have described as ASCAP's present posture, let us look at CBS. Structurally CBS network is composed of 200 affiliated TV stations, and I notice that in this complaint CBS confines its role to a TV network; but of course, and your Honor knows, CBS is also the owner and operator of TV stations, is also the operator of a radio network, radio stations and the owner thereof and does a lot of other things in music.

THE COURT: Yes.

MR. RIFKIND: But structurally, even in the TV business alone, it is a combination of monopolies. Of course every station has a lawful monopoly in the license granted

to it by the Federal Communications Commission; so you would have a combination of two monopolies and it is probably the single largest buyer and purveyor of music in the world.

THE COURT: What significance do you attach to that at this time?

MR. RIFKIND: I will try to compare it a little later. After all we are talking about a real market and a real stance by one vis-a-vis the other.

I understand, and my good friend representing CBS will, of course, have the more precise figure, but it is generally thought in the industry that CBS pays out over $10,000,000 a year for non-dramatic, musical rights. Such is the magnitude of its command of the air waves that no composer of popular music would regard -- every composer of popular music would regard it as a calamity if his music were excluded from the CBS network. On the other hand, because of CBS' vast power and command over the market, no single composer's music is indispensable to CBS. That is the relationship between the parties. And that being their relative posture, let us see whether CBS is under any compulsion or whether it has choices which are adequate to satisfy every statute known to anti-trust law.

They say, in paragraph 10 of the complaint, and I quote from a part of it, "Both forms of license" -- they

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are referring to per program and blanket -- "Both forms of license compel a broadcaster to pay for the right to use all copyrighted music in the ASCAP pool even though it might want rights only to some of those musical compositions." Now that is written in the complaint. And I say that allegation is false in whole and in every one of its parts. There isn't a true word in it. For one thing ASCAP isn't comeplled to do anything and neither form of license which is tendered by ASCAP compels CBS to do anything. No broadcaster is compelled to take a license. He has a whole host of options. For one thing he can take no license from anybody and play no music. They say they run programs without music. News stations run news without music. There is no law which says that CBS has to play music.

2, they can play only music in the public domain. Now if you think that sounds fantastic, all I need to remind you of is that for a period of about two years that is exactly what CBS did. They went on strike against ASCAP and for almost two years, if my memory is right, they played nothing but public domain and then they formed BMI so they had another source for current music.

Well, they might play a selective programs. They might take licenses from a limited number of composers and play their music and not pay ASCAP anything and not pay BMI anything because under the decree they are perfectly free to negotiate and to make deals with individual composers. And every license granted by every composer to ASCAP reserves that right to him because he gives ASCAP only a non-exclusive license to the sublicensing of his music.

THE COURT: As a practical matter do ASCAP members actually license individually?

MR. RIFKIND: Oh, yes, they sign a membership license in which they license for a specified number of years.

THE COURT: What has the history been with regard to their right to license others?

MR. RIFKIND: I know this much that for dramatic uses they must. Whether in fact anybody else has done it, I don't believe that I ever heard of CBS or NBC or any other station actually going out to look for an individual license. As a practical matter I think the answer is negative.

Now, of course, if they want they can take a license from BMI alone and not from ASCAP. After all

BMI now has a catalog of, I don't know how many hundreds of thousands of compositions and in addition they can enrich it with the public domain and thereby pay nothing to ASCAP or they can take it from ASCAP and not take it from BMI.

Now they can also take a program license from ASCAP or BMI or both and then they can play all the music they want, which they want, and pay only for those programs in which they use music and pay ASCAP only for those programs in which they use ASCAP music and pay BMI for those programs where they use BMI music.

Under such a license, a program license, the decision of how much music to play and which music to play is, of course, exclusively CBS's. True, as they say, that they pay just as much if they play two songs as if they played one song in the program, but that is like my buying the Atlantic monthly because I want to read one article but I paid for seven therein in the binder. The other choice they can have is to take a per program from one licensing society and a blanket from the other or vice versa.

Now they can take a blanket from both and while it involves a calculation of the fees from all charges for time the rate is so small that it is apprently the

most economic for large uses and the simplest to administer. So CBS has apparently thought it to be ever since the year 1926.

A page of history they say is sometimes worth more than a volume of logic. Having all these choices why has CBS always opted for blanket license? Why? Did anybody compel it? Is there any word of fact or law which says that CBS was obliged to take a blanket license? You know that it is not so.

And here is another interesting historical fact which may throw some light on the logic. CBS is not alone in making this option. It is not unique. All the large users of music, NBC, CBS and in the whole world, as far as I know, have always opted for the blanket license.

Now, your Honor, will I hope draw the inference that they must have made a calculation. How much will it cost if we exercise any one of the multitude of choices and options that I have listed; and if they have accepted and asked for and voluntarily optioned for the blanket, isn't it because they must have concluded that that is most advantageous for CBS? I have been told that the average cost to CBS of a single use of a composition under the ASCAP blanket license averaging all of its compositions

over the year runs to $190 apiece. This is for the network use over the whole country because the local stations don't pay again for those programs that have been licensed by the network.

THE COURT: Yes.

MR. RIFKIND: Now, $190 per use. If they think that is too high they have a forum in which to negotiate and adjudicate. Under the decree this Court stands ready to hear proof on whether or not the price is fair and right and reasonable and who has the burden of proof? ASCAP, not CBS.

If it is not too high then what are we doing here? Why should they be concerned with the system of calculation and the system of administration if it doesn't cost them any more money?

So I must come to the suspicious conclusion that they want to pay less but they don't want to justify their reduction in a court of law. They want to re-generate the structure of American music so that somehow or other CBS will pay less money to the composers and authors of this country without having a judicial determination that that is reasonable, rational and wise.

As I indicated to your Honor, the only license, which under the decree ASCAP must tender on request, is

a per program license and therefore that is the one that we ought to examine most carefully. Under this form of licensing, a per program license, CBS makes six decisions with respect to every program.

CBS decides the duration of the program, is it 15 minutes, half an hour, three-quarters of an hour, an hour, what have you. It decides.

CBS decides the content of the program. Shall it have music or shall it go without music?

It decides whether that music shall be foreground or background music or both and how much of it, whether one composition or ten compositions.

If it decides that it shall have music it decides whether it shall be public domain, BMI, ASCAP, SESAC or any other source of music. It decides the price it will charge the advertiser for the program which it has defined, for the content which it has determined, and for the musical insertions which it has selected. And all of these decisions are within the control of CBS, as far as ASCAP is concerned.

If the answer to the fifth question is in the affirmative, then does ASCAP enter into the picture.

If the answer to the fifth is in the affirmative CBS has to pay a fee to ASCAP. The amount of that fee

may be the product of a CBS's and ASCAP's agreement, consent or the product of an adjudication after a litigation in which ASCAP has the burden of proof.

The last contract which expired in 1969 was produced by agreement between ASCAP and CBS in court and then won the consent and approval of the court after a stipulation of agreement between the parties.

Under the most recent decree the per program fee is a small percentage of the time on the air charged by CBS to its advertisers for that program and only that program.

Now, your Honor will observe that all the decisions are CBS's decisions without intervention by ASCAP and that the last decision on price is one in which ASCAP only has a say but not a decision. To say that this constitutes compulsion of CBS is absurd and ludicrous. To say that CBS is by the per program license paying for copyrights it does not want is a fraudulent statement because only CBS picks out the programs it wants to play and the copyrights it wants to use and it is when it plays the music that it is licensed to play it.

What says CBS? If I took the per program license, which, of course, I didn't, if I took it I would pay the same percentage of the program and the same number

of dollars whether CBS decides to play one or ten songs, and that is true. That is not a very unusual arrangement in business. When you pick up the telephone you pay the same nickel for a half-minute, three-quarters of a innute, two minutes and up to three minutes because you decide how long to speak.

But in any event the Court has decided that the fee fixed for the per program license is fair if CBS plays one song.

How can it be unfair if CBS is allowed to play free five additional songs?

THE COURT: I would suppose -- of course, I haven't been in a position to decide what is the fair price, whether per program or blanket. Isn't that based on on the use of one song but it is based on the use of one song plus the right to use others?

MR. RIFKIND: That right they possess, of course.

THE COURT: Yes.

MR. RIFKIND: Now let us ask ourselves the question. Is that an unreasonable arrangement because, of course, if it is not unreasonable it isn't unlawful. The Antitrust Division ought to know something about what is lawful and unlawful in this field. They provided

for this arrangement in their consent decree. They insisted on it. As I indicated before no other license is permissible unless ASCAP first offers this per program license. And Judge Goddard who signed the decree thought that that was sensible and reasonable and Judge Ryan, who approved the last license arrangement, thought it was a fair and reasonable one and the Ninth Circuit thought it was fair and reasonable and CBS and NBC thought it was fair and reasonable.

Are we going to say that all of these experts that I have mentioned, the Department of Justice and the Court and the judges and CBS and NBC are all stupid and incompetent and don't know what they are doing?

Now let us analyze the fact apart from this body of distinguished witnesses that I have called. I think it is fair to say, your Honor, that there is no human intelligence which is capable of measuring how much dollar value music contributes to a program and I say it is even more certain, if there is such a more, that no human intelligence is capable of measuring how much a particular song contributes in dollar value to a particular program'

Now, if you had a one-to-one negotiation between a composer and CBS you might arrive at a price for that song that CBS wants. I would guess that it

would be different if we were talking to Richard Rodgers or to Arnstein of Arnstein and Porter fame. But whether it would be fair is certainly dubious considering the market power of CBS as a buyer of the volume of music that I have mentioned and the individual composer.

But in a group negotiation, under judicial protection, protection against predatory exercise of power, there were many possibilities in formulating this per program license.

They might have said let's make the day the unit of measurement and provide that if CBS uses any ASCAP music in any day they will pay a fraction of the revenue for that day for the use of that license. That would be comparable to my paying 50 cents to go in to see the Museum of Art and I can look at all the pictures I want or a very few of them.

They might have said the day is too long a period, let us make the hour the unit of measurement. Any hour in which ASCAP music is played you pay a percentage of the revenue for that hour.

That is a possibility. But apparently they said maybe that is unfair to CBS.

They finally said make the program the unit. That is like paying $1 to go and see a vaudeville show.

You can see the acrobats or you can see the whole program.

Now the program as a unit has manifest advantages to CBS. It gives CBS the greatest flexibility and is more responsive to its wishes.

After all, as I said, it determines the length of the program, whether it is much or little and it determines the charge for the program and it determines the content.

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Now the other alternative, the one advanced here is to make the individual compositions or minute the unit of measurement. As a practical matter that is not very feasible because, as I have argued, nobody knows how much a song contributes to a particular program and it is harder to decide how much a single song contributes to a program than to decide how much music contributes to a program. Besides, as soon as you get into identifying the price for each particular composition then you inevitably introduce a new factor. If you are dealing with individual compositions then you get away or tend to get away from the notion that music is fungible. Under the present arrangements music is fungible. It makes no difference whether you play Mozart or hubba hubba hubba. CBS buys its music by the yard. But if you say how much are you going to pay for Hello Dolly, then Mr. Jerry Herman might have some opinion on that subject. He might say I want to get paid more than Richard Rodgers or vice versa.

Your Honor expressed the thought that possibly, when we charge in the per program for one song and then give the others free that the charge actually includes the additional right. I want to suggest to you that that is not so. I think you have come to understand the motivations in this case. You don't use up the music as you play it. It is not

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like wire or tape or letter paper or what have you. The composer wants his music played on the air, A, because of reputation and B, because it helps sell sheet music, it helps sell records, it sells a lot of other things.

THE COURT: And he might like to hear it.

MR. RIFKIND: And he loves to hear his music.

So when the composers say we will charge you X cents for the use of the song and you can play all the additionals ones gratis they mean just that and that is the way it works because there is an unlimited capacity to play the music as your Honor pointed out. They can play a medley of 100 songs in ten minutes if they want to. But I can't understand why it should be legally horrendous If a man who orders an ala carte meal and pays 25 cents for a cup of coffee why should he complain because his neighbor's cup is refilled for the same 25 cents. If his 25 cents is unfair, then he has an argument but we have a court to decide that proposition and that has been adjudicated by their consent as not unfair.

THE COURT: Of course I understand that you contend now -- I am talking about that, that they are not able to get just a cup of coffee, that they have to buy Danish pastry along with it even though they are not hungry.

MR. RIFKIND: It is obviously not so that they buy anything else when they buy the per program. They don't pay

for any song except the song they play the music on. That is the only song they pay for. If they take two songs they pay for two songs but never for any music they don't want. There is never the slightest suggestion in the per program license they are obliged to pay for anything they haven't used.

THE COURT: As I understand the per program license, if they buy the license for a program tonight, they can play anything they want on that program and they pay the same price for that license, isn't that correct? I want to understand this.

MR. RIFKIND: They don't buy a per program license for tonight. They buy it for the year, the season or the period, whatever it is and under that they put on a program and if they decide they want music in that program and they want ASCAP music in that program, then if they charge $1,000 for that program they know there is a defined percentage in the contract which they have to pay for the music. But they decide which music to play.

THE COURT: I understand.

MR. RIFKIND: And they don't pay for any music they haven't played.

Well, there is one more important thing that ought to be brought out. The composers are entitled to this. The

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fact that in the distribution of their proceeds they may treat all songs as equal and uniform, it doesn't mean that in the sale of their songs they have to treat all songs as equal and uniform. What they did in their distribution system is one thing and what they do in their sales program is another. There is no logical connection between the two.

As far as I know there is no law which says that you cannot fix a royalty on a copyright or a patent by reference to the benefit or to the proceeds accruing to the one who exploits that copyright or patent. And the notion that it has to be a fixed number of cents or dollars just doesn't correspond either to practice or to the law, especially when you are dealing in a field in which there cannot be any cost accounting of music, in which there really isn't any competition in the sense that every piece of music is, after all, unique. It would seem to me that percentage pricing is almost inevitable. Any way, it is a reasonable arrangement.

CBS does not propose that we should price each separate composition independently and arrive at how much we are going to charge for White Christmas and how much we are going to charge for Porgy and Bess or Hello Dolly or My Fair Lady or anything of that kind. They pay no attention to the identity of the author or composer or to the reputation of the song or to the demand for the song. They insist that

all songs be treated as fungible and if fungible then how are you going to price it except by a percentage of the program in which it is used.

It seems to me perfectly logical and rational for 17,000 composers, authors and publishers, using the figure that my learned friend has recited, to say as amongst ourselves dealing with millions of broadcasts we shall treat all compositions as fungible. But that does not mean that a retail buyer of one song, per piece, is entitled to have a uniform single dollar price on every one of them.

There is another consideration which should prompt composers to resist such a change. As soon as you put up a separate dollar price tag on each composition you tend to reduce the use of the music. If the producer knows that he has a license to use all the music he wants without concern and without care, he fabricates his program in a way which he thinks his best interest of the program is, whether it is artistic or commercial or whatever may be his criteria but money does not affect it or influence it as would be true if for every additional song he puts in he has to pay out some money. Once you introduce that system it is a depressant and there are so many reasons why composers and authors and publishers do not want to do that.

And finally I suggest to you, your Honor, that th

question is not whether there are additional and different ways by which we might price programs that use music. The only question is whether the system authorized by the decree is rational and reasonable and I can't think of any reason why it should be labeled otherwise.

Now so far I discussed a per program license which is a highly theoretical institution because, as I have indicated to you, CBS has never accepted a per program license. It has always chosen at its wish to take a blanket license as have all the other networks. And as I have indicated that must reflect a calculation of advantage.

Now let us look at the blanket license for a moment which is optional, entirely free, you either take it or you don't and nobody compels you to take it. Before CBS elects to take the blanket license I assume that its calculating machines determine precisely how many compositions it had broadcast in any particular period of time, how much they have paid out and how much the songs cost and then they compare it with what a per program license would do and they decide on the blanket because they think it is cheaper or better ors more convenient,whatever may be the reason which prompted their decision. It makes sense that only lar, users of music would opt for blanket license for the same reason that it is only a man who uses the telephone to Washington very, very frequently

rents a direct line to Washington. If having rented a direct line to Washington and paid the charges he finds he doesn't make enough use of it, it is hardly fair for him to complain to the Telephone Company that he is paying for calls that he doesn't make.

THE COURT: He has the right to terminate that.

MR. RIFKIND: Yes, of course, and so has CBS. So as I sum it up I see it this way. CBS elected a blanket license, although it was not obliged to take it. CBS consented to the rate which that license imposed. It was not coerced into accepting it. It had a judicial remedy. It couldn't even say that it was coerced in the sense that it couldn't afford to wait for the judicial procedure if it were unlicensed while the courts were grinding out the decision. They might say, well, we had no real freedom, we had to grab the first license tendered us because we couldn't afford to take the two or three years it would take to get the answer.

As I have indicated to your Honor they were licensed the minute they asked for it. They could have taken a per program and they could have taken none. So CBS is not compelled to take any license. It is certainly not compelled to take the blanket license. When it last elected to do it it exercised its choice to take what it wanted.

THE COURT: You don't mean CBS consented to the

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decree?

MR. RIFKIND: Yes, it did.

THE COURT: In what respect?

MR. RIFKIND: I mean the rate making decree which approved the license in -- which expired in 1969.

THE COURT: Right. Now I understand you.

MR. RIFKIND: That is what I am talking about. One thing ASCAP has never done and has never had the power to do and that is ASCAP has never said to CBS you have to pay us so much per composition in our catalog, whether you want to use it or not. If ASCAP had done such a thing then they could validly argue that they were making them pay for music they didn't want. That has never been the practice and it is not permitted under the decree.

I have asked myself the question, your Honor, what does CBS really want in this proceeding? It is not an easy thing to discover. It took me a little while to realize just what it was after. Manifestly it doesn't want ASCAP dissolved, we are clear on that, and it doesn't want the pool dismembered.

In paragraph 15 of the complaint it says, "It is essential to the plaintiff that it have the rights to use many, if not all musical compositions in the ASCAP and BMI pools. Any attempt by the plaintiff to acquire such a large body of rights from individual members of ASCAP would be be

wholly impractical" and so on and so forth.

Now if all CBS wants was reduction in the royalty rate -- and incidentally succesively over the years there have been reduction in royalty rates as we have had the various rate making proceedings in this courthouse -- but if all it wanted was a reduction in the royalty rate it had the opportunity to argue that in a rate making proceeding under the decree. It knows the per use cost of its broadcast because it has an adding machine in its office and if all it wanted was to pay the same sum of dollars but in a different system why should it make any difference? But, your Honor, when I discovered what CBS wanted, I was startled, and then I mentioned the fact that CBS is a monopoly of monopolies. I say to you that only such a monopoly, constituted of a few hundred monopolies would have had the gall to propose what it is now proposing and I realize and I apologize for using the strong words.

Because as I read its brief, what it wants is the following: continue ASCAP, continue the pool, treat all music as fungible, fix a uniform price for every composition used in prime time, a uniform price for every composition used in non-prime time and this will establish, say they,a ceiling on the per use of each composition in ASCAP. What do you do with the ceiling? Then, and I am reading from page 8

of its brief, "Then the broadcaster would be free to deal with the copyright proprietor. The broadcaster will then be free to deal with the copyright proprietors directly without paying twice for the same right and for that reason writers and publishers would commence joining the ranks of the free enterprise system by competing on a price basis to fulfill their customers' needs" and then it goes on and says "The inevitable result of increased competition will be that broadcasters and program producers would license the preponderance of their needs directly and rely on the pool for only a portion of what they require" and so on.

So let us see if we understand it. CBS would, under the umbrella of a price ceiling on every composition hold a Dutch auction, assembling all the authors, composers and publishers who are interested in having music played, to see which compositions it could then get for less than the ceiling. You can visualize a negotiation which says, "Mr. Irving Berlin, for $100 we can play any song in your catalog but we won't play it unless you cut it down to $90. We can get Mr. Rodgers for $75." With its vast buying power and its monopoly market power and its monopoly market power CBS wants the additional weapon of an judicial ceiling to club composers into submission. Of course I had trouble in arriving at the conclusion that. That was the aim of CBS because I had trouble reconciling what it said

paragraph 15 that it was impractical to deal with all the authors, composers and publishers with page 7 and 8 and of its brief where they say that is what they want to do. The two things seem to me to be somewhat antagonistic toward one another.

But I suppose that the answer lies in the proposition that the incentive of the available opportunity to exploit the composers would lubricate that which is difficult into something very attractive. I think that is an hallucinated dream, your Honor, conjured up only by newly arrived architects of the musical structure for the United States. It is just as mad as for an employer to suggest that the union should serve as a standby reservoir of manpower when he needs it and in the meantime should establish the wage ceiling beneath which the employer will then negotiate individually with every employee. CBS wants ASCAP to do just that. It wants it to function as a standby service to furnish musical manpower whenever CBS needs it. If the music is otherwise what they call inaccessible -- inaccessible might mean that they don't know where the composer is, or they want the song on Monday night and they thought about it Monday at noon and they can't get it that fast, or that the man doesn't want to do business with them, so they want to be able to say, well, if we can't get it, we always have a license from ASCAP.

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Then they want ASCAP to serve as a means of fixing the price ceiling and as a means of achieving fungibility and then buy the actual music from the individual composer in a reverse competitive system. It goes so far as to visualize these composers all getting up sales offices to line up and knock at CBS' door, please play my music. So, in order to achieve this imaginary situation CBS says let's continue this illegal combination though we tell you it's illegal, let's continue this illegal pool and let's illegally fix prices because they say all these things are illegal; so long as these devices are used to enable a monopoly to sweat-shop the authors, composers and publishers. Let us use ASCAP as the price breaker and as a weapon against its own members. But the simple answer to that is, your Honor, what law compels authors, composers and publishers to persist in such a suicidal society? Why not dissolve and let CBS search for its music. Let it set up buying offices.

The idea that thousands of authors, composers and publishers would at their own large expense maintain an organization for the purpose of destroying themselves can only be entertained in a fevered imagination. The notion that such madness is commanded by the law would lead to the famous expression and that is that if that is what the law is, the law is an ass. It cannot be that the antitrust act is

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a compulsory suicide pact for composers and an all season hunting license for broadcasters especially for those with the clout of CBS.

Just a little more, your Honor. There are a few things in the CBS brief which need a little answering. The CBS brief is replete with the suggestion that the plaintiff is somehow or other obliged to take an entire package. I can't understand how such an argument can be advanced. It is never obliged to take the entire package or any part of the package.

If ASCAP offered only a blanket license or if ASCAP charged so much for every composition in its catalog then you might so argue but under the per program license CBS pays nothing until it makes a selection and broadcasts the composition. By playing it CBS is licensed to play it and it pays a royalty on the program in which it uses the music.

I suggest that the entire package argument is spurious. It is like suggesting that when Macy's says you are welcome to come to my store to buy anything that somehow or other Macy's compels you to buy everything. It is nonsense. Then they make an argument that we are engaged in a boycott. I don't know whom ASCAP boycotts. If certainly doesn't boycott composers.

It certainly doesn't boycott broadcasters. It certainly does not require any members to boycott CBS or any other users. After all, all ASCAP has is a non-exclusive license to deal with non-dramatic rights.

But, says the plaintiff, the members have no incentive to deal with them directly. Considering the plaintiff's protestations that it is impractical to deal direct, this sounds like whimsy.

The question I would like to put is, has CBS ever tried to deal with any individual composers? Does it allege that it tried and that it was rebuffed?

I suppose that even if ASCAP were ultimately dissolved and if authors, composers and publishers then had to organize themselves in some other fashion, I don't believe that there would be 17,500 separate sales agents. I would rather suspect that it would tend to funnel down into 1, 2 or 3 places. We would still have the same story of the lack of incentive to deal individually.

If there were any merit in the plaintiff's position, then it should ask for dissolution but interestingly enough it makes no such request.

Then it makes an argument that we are guilty of tying in. It is a spurious allegation.

In its brief the plaintiff suggests that ASCAP

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conditions the licensing of accessible music upon the buying of inaccessible music and conditions the licensing of wanted music upon the buying of unwanted music. I say that is just nonsense. There is no such condition.

I can only say that they have not read the per program license or the provisions of the decree relating to per program licenses. Indeed, as I have said, CBS is free to get what it wants from copyright owners and there is no compulsion for any license at all from ASCAP or it can get the per program license.

If to suit its own convenience and advantage CBS selects the blanket license it oughtn't to complain about it.

A word about the authorities and I will take a half minute on that, your Honor.

I assume that your Honor either has or will read the Ninth Circuit decision in K-91 case?

THE COURT: Yes, I have.

MR. RIFKIND: In my opinion that case and this are indistinguishable; and I am sure you have read the Solicitor General's recommendation to the Supreme Court not to grant certiorari. That advice was not given on the Solicitor General's initiative, it was given on the Court's invitation, thus giving assurance that the denial of certiorari was not the

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product of a crowded Supreme Court calendar or a failure to apprehend the issues.

My learned adversary says the Solicitor General did not adopt the reasoning of the Ninth Circuit but only the result of the Ninth Circuit. If that suggests that there are additional lines of reasoning in addition to those found by the Ninth Circuit which support that judgment, I am quite content.

THE COURT: You don't care if I adopt their reasoning as long as I adopt their result?

MR. RIFKIND: It is the results we are concerned about. I have no doubt that there is more than one line of reasoning. There usually is.

As to the Zenith and Hazeltine, I would like to suggest to your Honor that our brief adequately analyzes that opinion and that it requires very little discussion, just to say this.

In Zenith the Court found that Hazeltine conditioned Zenith's rights to take a license on term which required it to pay royalties on products which did not use the patent and it emphasizes over and over again that that is the vice which the Court finds in that arrangement. But, of course, ASCAP has never engaged in any such practice as that which is condemned in Zenith nor

could it under the agreement. The decree forbids it and nowhere -- this is important, your Honor -- nowhere in the complaint is it suggested that ASCAP has violated the decree.

Zenith expressly authorizes what happened here, namely the voluntary election by CBS to take the blanket license which it took. And when I read in my learned friend's brief that he starts citing cases way back in the dark ages of pre-1940 or thereabouts, then I know there is something he doesn't find that he is looking for in the cases that have occurred since then.

There are some social implications in what we are doing. These days we have become accustomed to consider the environment when action is to be taken. I have reference to the cultural environment.

The present system does encourage music on programs without regard to cost of the music. As I said before, whatever the producer thinks will advantage the program by the use of music he is free to do it because he has no budgetary problem in connection with it. You introduce this new fangle thing that our friend is advocating and you will change that.

THE COURT: Is there anything we could to to put more soft music on and have less loud music?

MR. RIFKIND: Yes. I think you ought to write to CBS.

I think CBS is wrong when it says there is something unusual about composers and authors not organizing sales people to go out and push their wares.

First of all many of them do. They do go around and push the use of their music. They encourage disk jockeys, as your Honor knows, sometimes by methods that haven't been approved of.

THE COURT: I have had to try such cases.

MR. RIFKIND: Actually it is not an unusual practice that suppliers organize salesmen to go looking for customers to buy their products. There are many industries in which the consumer, the buyers organize purchasing agents to go after the supply and that is particularly true in cases where the purchaser is big and rich and powerful whereas the sellers are atomized individuals and so on and haven't the means for these kinds of sales organizations.

If CBS thinks a sales organization would be helpful certainly they have both the incentive and the means to do it.

Five minutes, your Honor, and this will sum up my argument.

THE COURT: Before you sum up, so that you have in mind one question that I have and want to express to you.

I would like you to comment on the absence of a factual issue here. I don't mean to say that there is an absence but that is a question for me.

I understand the legal positions of the parties and I am merely concerned to know to what extent the parties -- I expect I know the positions they will take but what they have to say to the extent in which I do or do not need further facts to decide this case. If I need further facts I can't grant your motion however meritorious it may turn out to be.

MR. RIFKIND: I started talking about the absence of an affidavit.

THE COURT: That is a significant point.

MR. RIFKIND: We have, of course, filed a 9-G statement.

THE COURT: What I am really asking, I guess is, either for you or one of your associates to perhaps comment on the disagreement which the plaintiff expresses with your 9-G statement and the extent to which they say things are still open.

MR. RIFKIND: As I look at their 9-G statement

I had the impression the things they disagreed on weren't very relevant. I think if the argument discloses we are clashing on a fact then we ought to resolve it. But so far I have not become aware of any factual matter, some item of history or event or practice about which there is a disagreement. If there is I think we should resolve that and there won't be any dispute about it because, as I said, everything we do is right out on the public stage.

THE COURT: All right.

MR. RIFKIND: Your Honor won't mind if I am going to be not too heavyhanded about my summation because I am going to really put it in the light of a certain amount of amusement in the plaintiff's position and I think I ought to reflect it so I will put it this way.

A funny thing happened to me on the way to this judicial forum. I had passed the home of Mr. Sulzberger so I dropped off there and I drafted a letter for him which reads as follows:

"Dear Mr. Sulzberger:

"I believe that your current practices with respect to the sale of the New York Times are unfair because they obligate me to pay for articles I do not read. It is my view that this is illegal for

you to continue to impose such package sales upon me against my wishes.

"At present you charge 15 cents irrespective of the numbers of columns I am interested in;but why should I pay for the spot news, the financial news when all that attracts my fancy are Reston articles on acupuncture in Pekin and Russell Baker's observations on human foibles. Your arrangements are unfair because the amount I am forced to pay is not measured by the use of the copyrights. Zenith against Hazeltine has unqualifiedly held that a licensee may insist upon paying only for use. You have entered into a host of agreements with a whole group of copyright owners who write domestic news, foreign news, sports news, financial news, editorial, book reviews and so forth.That you call them employees that have employment contracts does not deceive me at all.

After all what you have done is labeled the devices to conceal the contents. So successfully have you conspired that today in New York you have but one morning rival. I am quite prepared to consider with you a rate structure reflecting the relative value of your several columns or you

might wish to offer me a rate on per minute of reading time. I no longer care to submit to a system which makes me buy a license to a whole package of copyrights; and I am threfore asking you to give me a per piece license and from time to time I will tell you what class of pieces I am interested in.

"Moreover I am not pleased that by your arrangements you have taken away Mr. Reston's incentive to sell me the right to read his piece on acupuncture in a private deal between us. And indeed so thorough have you destroyed that incentive, that he does not even make himself available in the market to promote his wares. I want you to fix it so that I can buy a license for a penny good enough for a particular article and if I can't buy that article I want you to stand by with your price fixed package so I can take it in case of an emergency."

What happened was that he thought I was spoofing and I told him I was; and I said I think the complaint that CBS has filed here is a spoof and that I hope it wouldn't be taken seriously because there is no basis in fact or law which would entitle CBS to any relief in this court;

and I therefore move your Honor to grant

summary judgment in favor of the defendant dismissing the complaint on the merits.

THE COURT: Thank you very much.

Mr. Hruska?

MR. HRUSKA: May it please the Court. Before I answer any of Mr. Rifkind's arguments, or his very amusing but I'm afraid, irrelevant letter to Mr. Sulzberger, I would like to get on the table several basic propositions that will determine the outcome of this motion, I believe, and will ultimately determine the resolution of this action.

On the ASCAP side of this case we are dealing with somewhere between 17,000 and 18,000 separate music publishing corporations and individuals, companies and people with a product to license or sell. These are the natural suppliers of music and they are natural competitors. If those suppliers acted independently two significant things would happen in this market which do not now occur.

As separate, independent suppliers these publishers and writers would solicit their customers for business. They would make themselves available to those customers.

Moreover, in soliciting and negotiating with their customers they would compete with each other, compete on a price basis. Obviously that is not what

happens.

These 18,000 suppliers have combined. They have pooled their music, between one million and two million musical compositions, and they have designated a common agent to license the music in that pool.

Those acts of combination have created enormous leverage; leverage which no single supplier of music can have on its own, leverage which no single user of music could possibly withstand. It comes about in two ways. In the first place the existence of the pool raises the competitive requirements of every large scale user in this country, including plaintiff. If there were no music licensing pools plaintiff and its competitors would be on equal footing. They would use only music made accessible to them by their efforts, the efforts of program packagers, that is the producers of television programs, and the efforts of suppiers themselves, the writers and the publishers of music.

Given the pools, however, no large scale user, that is no radio station, no television station, no television network could afford to allow any of its competitors to get the upper hand, the dispositive competitive edge, the advantage of having a license to that pool without itself obtaining it.

THE COURT: You say it would be on equal footing in the pool. You are on equal footing in a different level.

MR. HRUSKA: We would be on equal footing with NBC and ABC in getting music.

THE COURT: It seems to me under the existing circumstance you are on an equal footing but you are both

faced with the same problem.

MR. HRUSKA: All I am saying is if this pool did not exist we could get along without it. We could not get along without it as long as it does exist and our competitors have a license to it. The alternative is likely to be economic disaster and this has been spelled out in our affidavits.

THE COURT: I don't think it goes to the motion necessarily. If the pool didn't exist but NBC began to negotiate with Irving Berlin and Richard Rodgers and so on you would have to do the same thing to protect yourself or find some other composer with equal standing.

MR. HRUSKA: We would have to do that and we would seek out these people and these people would see us out. This is the normal thing that happens when people have a product to sell and people want the product to buy. This type of economic analysis and these facts have been spelled out in our affidavits.

There has been some suggestion here that there were no affidavits. It is true there were no affidavits filed specifically on this motion but our brief referred to and relied on affidavits that were filed on the BMI preliminary injunctuon motion, namely affidavits by Don Sipes, by Mike Dann and by a host of television producers. Those affidavits

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bear on the issue presented by this motion.

THE COURT: There is plenty of grist in the mill as far as that is concerned but before you are finished I do want you to make more clear to me than I now am as a result of the 9G statements just what facts a trial of the issue here would consist of.

What would I be trying and what do I need before I can decide the case?

MR. HRUSKA: I will do that, your Honor, before I go.

I said there would be two significant things happening in this market if there were no music licensing pools. The first one I described -- I was discussing the effect which the pools had on the market and the first one I described was the raising of the competitive requirements at each level of competition of broadcaster and television networks including plaintiff. And I was about to suggest, and I do now, that the absence of a license from this pool, given this vast number of compositions that the pool has, given indeed the immediate accessibility of all those compositions, given the programming flexibility which such a license affords, that no competitor could allow its competitor to have a license with that pool and not itself obtain one. It would be economic disaster to do otherwise and this is

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supported by our affidavits.

In the second place at the same time that the ASCAP combination sharply raises the competitive requirements of every large scale user, including plaintiff, it also sharply reduces any possibility that those users could license their requirements directly. Because once it is established, as it has been in this country formany, many years, that all users of music must and will obtain blanket licenses from the common licensing agent of the pool,ASCAP, there is no reason why any publisher or any writerwould solicit any user to accept direct licenses and there is no reason why they would establish any sort ofsales organization or sales facilities or hire salesmen for that purpose.

Obviously once a user has a blanket license he can go out, yes, and buy rights to music but certainly he is paying twice for the same rights and that is the element here which forecloses competition.

Given those two elements, if any user would go out in the cold and stop doing business with this pool it would be immeasurably more difficult for him to license his needs directly than would have been the case if there were no pool to begin with. In other words, the creation and the operation of the ASCAP pool has set up a situation in which plaintiff and every large scale user must deal in some

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fashion with that pool. They have no realistic economic alternative.

But the pool does have a choice, a highly significant choice as to how to license those users and that primarily, I think, that choice is what this case is about. The pool can license on a per use basis which will permit competition to a very significant extent.

THE COURT: But by saying it can it is not foreclosed by the decree by doing so.

MR. HRUSKA: It is not foreclosed by the decree and it is not foreclosed by anything else. It has complete freedom to do that.

On the other hand the pool can and it does insist on licensing only on a blanket or a per program basis which utterly, completely, automatically eliminates all competition between these 18,000 people, completely snuffs it out. This combination is violating the antitrust laws because it is offering the user not a choice between a blanket and a per use license but a choice between two forms of injury; the acceptance of a blanket or per program license which will eliminate the user's access to a competitive market or no license at all which will probably eliminate the user.

Now first on this motion, defendant sought to justify

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that insistence on blanket terms by relying on the Ninth Circuit decision in K91, which is to say on two provisions of the 1950 ASCAP consent decree in which that decision was in turn based, the non-exclusivity provision and the judicial rate making provision. We answered those points in our brief and I would like to expand on that answer a little later. Right now I would like to turn to the new set of arguments that defendants raise for the first time in their reply memorandum and have repeated here this morning. There seems to me to be a strong indication in those contentions that defendants are walking away from this motion. I say that because all these new arguments having to do with what kind of per use license plaintiff purportedly wants and the purported illegality of such an assumed type of license all go to the details of relief and do not even relate to liability issues of this case let alone provide any grounds for summary judgment. I would like to turn to them one by one. By my count there are approximately five. The first is the so-called economic club argument.

As I understand it it is the defendant's contention that what plaintiff really wants is to have the per use schedule of rates operate as a price ceiling so that no ASCAP member in direct negotiation with the CBS television network, CTN, as we have been referring to it, or the packagers

of CTN programs could obtain a higher price than that set forth in the ASCAP per use schedule rates. I don't know where that argument comes from. It doesn't come from us because we never said any such thing. If an ASCAP member wants to charge plaintiff for any program packaging more than the ASCAP per use fee, he will be entirely free to do so so far as we are concerned. All he has to do is to rescind ASCAP's authorization to license his music at per use rates or otherwise and he can charge us for program packages as much as he wants.

THE COURT: You say he is perfectly free to do so. Why will you do so if you have already the right to license the music under a blanket setup? Why would you pay him more?

MR. HRUSKA: A very simple reason, your Honor.

THE COURT: Let us have it.

MR. HRUSKA: We didn't would sit down and negotiate with the man and we would say, as Mr. Rifkind pointed out, there is that $100 or $190 or whatever the figure is on the ASCAP per use rate schedule and we want to get you below that and the man says I think my music is pretty good and I want to get you above it and I am not going to license it to you at that rate and I am going to rescind ASCAP's authorization to license it to you.

THE COURT: Is that a realistic assumption?

MR. HRUSKA: Why not? I think it is. We are not stopping them from doing that. We may need some relief here.

THE COURT: I agree with you that the motion shouldn't deal, at least peripherally with this, but I do find some difficulty in believing that a man who is going to, say, well, I am going to unlicense or whatever the right word would be, revoke the license of ASCAP and you can't play my music at all unless you wise up and pay me $150 when I get $100, whether you play it or not.

MR. HRUSKA: I am sorry, your Honor, I don't see the problem. It seems to me that here we have people who are now in a combination. They have authorized the combination to license their music and that is what we are talking about right now when we are talking about per use terms. The license will be at a per use schedule of rates from the combination.

Now, if that man wants to continue along with having the combination licensing CBS--

THE COURT: Just as it is now?

MR. HRUSKA: Well, except under per use rates.

THE COURT: Yes.

MR. HRUSKA: Then he is free to do so. But if he wants to say you can't license CBS at those rates because I want to license CBS at a higher figure --

THE COURT: I understand that. I don't want to get

off on this aspect of the discussion too fully because I don't think it is really determinative of what is beforeme.

What I am saying is it may be unrealistic to assume he will do that in order to threaten you so that you will give him a higher rate when he already has what he may consider to be a perfectly satisfactory deal going. Of course it depends if he knew that by revoking his license with ASCAP tomorrow you will come around and pay him twice as much, then I suppose he would but the likelihood of that is rare. This is a diversion which is interesting but we have no time for it.

MR. HRUSKA: It is a diversion but it is the principal argument they make in the reply brief and the argument on which Judge Rifkind concluded this morning. I think ASCAP at least thinks very highly of its argument. My only point is to suggest and to state that this argument doesn't exist, it is a myth. There is no such thing here as an economic club. It seems to me it is the member's lookout if he doesn't want to rescind ASCAP's authorization to license us at per use rates.

THE COURT: Particularly what the people will do in a hypothetical circumstance is a dangerous sport.

MR. HRUSKA: It is their choice, that is the point.

THE COURT: Yes, it is their choice.

MR. HRUSKA: The second of these new contentions is that an ASCAP per use schedule of rates would have the same price fixing effect as the present ASCAP system.

Here again the contention is wrong. It couldn't be wronger as I think Professor Kessler used to say.

Let us say for argument's sake that in a per use world 60 per cent of the CBS television network uses were licensed directly from writers and publishers, either plaintiff or packagers of programs, and let us say 40 per cent were licensed under the ASCAP per use schedule.

The figures are not important here. It could 50-50, it could be something else.

THE COURT: Right.

MR. HRUSKA: As to that first 60 per cent, music licensed directly from writers and publishers, each writer and publisher will charge whatever he wants, less or more than the per use rate, whatever the market will bear. There will be no agreement built into those transactions that the writers and publishers will charge the same thing. They will charge whatever they can get and they will compete in so doing.

Now, as to the other 40 per cent which would be licensed at the ASCAP use schedule of rates, it might be

argued that the anticompetitive effect would be just as bad as that which occurs in the present system and I won't debate that now because I don't think it is relevant; because the per use system is certainly not worse than the present system and the significant point is that the per use system would be a whole lot better than the present system in terms of the objectives of the antitrust laws because it will allow competition to go forward with respect to a significant portion of the user's needs, the 60 per cent I spoke of in my example, whereas the present system precludes such competition entirely.

In other words, per use relief in this lawsuit will substantially alleviate a major problem. Ultimately as other large scale users obtain per use terms from this combination, writers and publishers will establish sales facilities and an increasing proportion of those needs will be fulfilled by dealing with those sales facilities in a competitive framwork. The net result will be that the inauguration of a per use system will have a continuing self-generating competitive effect.

Defendants say, however, and this is their third contention, that the only appropriate remedy in this case would be dissolution. I am not quite sure I know what they mean by dissolution, whether it is an order dissolving

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ASCAP completely or simply prohibiting ASCAP from engaging in its common licensing function while allowing it to continue to act as a policer of music; in other words, allowing it to continue to check users to make sure they are not infringing the copyrights of its members.

At any rate I suppose they make this argument because they believe that no one would dismantle a copyright pool of this magnitude that has existed for almost 60 years.

Also I suppose -- in fact Judge Rifkind has told us this morning -- that they believe we don't want this pool to be dismantled. They are wrong on both counts. They are wrong on the second because if we had to choose between the dissolution of this pool and continued denial of access to a competitive market we would certainly elect the dissolution of this pool.

Under Rule 54-C of the Federal Rules the relief to be awarded in this action is the relief to which we are entitled, not necessarily that for which we have asked. We have asked for a moderate solution but if we have to choose a more drastic solution I know we would choose it. And they are wrong on the first count because if a single company much less a combination of thousands of companies cannot do business except by violating the antitrust laws, why, then,

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can they not do business. Their alternative is, as the Supreme Court has held on many occasions, is for them to petition the Congress for legislation that will exempt them from the operation of the antitrust laws. But this combination's refusal to grant per use terms, ~~that is, its refusal to grant per use terms,~~ that is, its refusal to license in any fashion other than in an anticompetitive basis, is hardly indispensable to its existence.

The plain fact here, and defendants have not offered one shred of evidence against it, is that the administration of a per use license for the CBS television network would not add appreciably to the job that ASCP already performs in administering the per use system by which it distributes revenues to its own members. And if a per use system can work for the distribution of the proceeds to ASCAP members it can work for the collection of those proceeds from ASCAP customers including plaintiff.

THE COURT: To what extent does the workability of your proposal have anything to do with whether or not they are entitled to summary judgment?

MR. BRUSKA: Zero. I mention it only because I am answering their points. I said that at the outset.

The fourth contention is not so much new but it is

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new in this context. Relating back to ASCAP's affirmative defenses, it is that plaintiff is not entitled to any relief in this case because allegedly it too is a combination. I am not going to spend time on this. This is hardly a summary judgment point. Not only is it not proven but it is not even sustainable as an affirmative defense.

I think what they are really getting at here is that plaintiff should not be allowed to deal directly with writers and publishers because CBS is big and they are small and it is unfair.

This is more of a jury point than a legal argument, but I would like to take one second on this.

On the publisher's side of ASCAP we have such economic dwarfs as Warner Bros. and the like and one might find it difficult to shed tears over the prospect of their having to compete on a price basis.

If the small writer has popular music, quality music, music in current demand, and we aren't going to use it unless it is in some demand, their bargaining power is there and creative people are known to do very well in dealing with television networks. But the fact is that if this market were allowed to function more freely under a per use system we would be involved in comparatively few direct negotiations with writers and publishers. It

would be the program packagers that would take on that job. Right now they supply all other elements of the program including the copyrights of all other program matter.

It is only because of the existence of this pool and the pool's insistence on blanket licensing all the stations and networks, that producer --

THE COURT: When you say insistence on blanket licensing you mean insistence on either blanket or per program?

MR. HRUSKA: I do.

THE COURT: I take it that of those two choices the network prefers the blanket license?

MR. HRUSKA: I don't think there is a choice as applied to television networks. I think a per program license as applied to a television network is nothing more than a blanket license at a higher rate.

THE COURT: That is what I wanted to know.

MR. HRUSKA: If you want me to explain that further I will be happy to do so.

THE COURT: I understand there is higher percentage right on a per program license and you will have to use it on all programs and you would come out worse.

MR. HRUSKA: That's right, and it has exactly

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the same effect of foreclosing us from a competitive market.

The fifth and the last contention that defendants -- of these new contentions that defendants have advanced regarding the grant of per use terms is that the ASCAP consent decree prohibits it. I don't think Mr. Rifkind mentioned that this morning. It is in their brief. The reference is to Paragraph 6 in the decree which enjoins ASCAP from granting, "To any user a license to perform one or more specified compositions in the ASCAP repertory unless both the user and member or members at interests shall have requested ASCAP in writing to do so."

I should note, preliminarily, that defendants think so much of this argument, the first time they mentioned it is in a footnote to a reply brief and they did not mention it this morning.

If something were important like that it would be in the forefront of their motion. Not even ASCAP believes that this section of the decree is intended to apply to a television network let alone to a network license covering thousands of musical compositions.

THE COURT: Of course nobody here had personal experience except Mr. Finkelstein, I suppose. Maybe he

can answer this question.

What was the legislative history of this particular clause, Mr. Finkelstein, preventing ASCAP from licensing one or more except with the joint consent of the composer and the licensee?

MR. FINKELSTEIN: Yes, your Honor.

When Mr. Timberg presented this in the Federal Court in 1950 in that decree he mentioned this was a provision for the protection of the composer.

THE COURT: All right.

MR. FINKELSTEIN: That is in the record.

MR. HRUSKA. I should say in the NBC proceeding wherein NBC is applying for a limited repertory license on the basis of this section, ASCAP argued in its brief and I quote:

"The second sentence of Section 6 dealing with specific compositions was intended to apply to users of very few compositions and certainly not to broadcasters or networks which use music in bulk."

As a matter of law, however, it doesn't make any difference what that provision of the decree says because if a consent decree requires or condones a result inconsistent with the antitrust laws, it is the consent decree and not the antitrust laws that must go. That

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was the holding in the Columbia Artists Management case we have discussed in our brief and it is clearly required by the fact that a consent decree cannot override the dictates of a federal statute. It may be effective in disputes between parties to a decree, The United States Government and ASCAP, but it obviously has no effect as to non-parties to that decree such as plaintiff.

In short, all these arguments as to what kind of per use license plaintiff wants and the efficacy of such terms have nothing to do with the liability issue in the case. They are concerned with the details of relief which will become significant in this action only after we prevail on that liability question.

And I would like to talk a little more about why it is that we ought to prevail on the liability issue of this case and on this motion and why the K-91 decision does not validly indicate the contrary.

THE COURT: You are not moving for summary judgment for CBS, are you?

MR. HRUSKA: I am not moving for summary judgment, your Honor, no. I can tell you why if you would like to hear.

THE COURT: I assume it is because you think

there are some facts I have to try. If you thought all the facts were in you would ask me to decide in your favor.

MR. HRUSKA: I would like to see this record more complete than it is now. If we were to move for summary judgment and we were to win the motion I can see spending a year two years, maybe longer in the Appellate Courts with the possibility that some Appellate Court will get the feeling there is a loophole in this record and we can come right down and do the whole thing all over again.

THE COURT: I don't want to quibble with you and I don't want to send anything up and obviously this will go up as high as the Courts will accept it unless the record is sufficient for everybody to be able to tell what is going on but that is a different thing from saying that there are or are not sufficient facts before me. There is or there is not a genuine issue of material fact under Rule 56; so, as I say before the discussion concludes I want to zero in on what are the genuine issues of material facts within the meaning of the rule regardless of putting enough flesh on the bone, as it were, of the case.

MR. HRUSKA: Right, I will do that.

Let me just briefly summarize here these points, getting into the matter of the liability issue.

The acts of combining by nearly 18,000 separate suppliers of music and their pooling of between one and two million musical compositions creates such leverage in the combination as to force large scale users, including plaintiff, to deal with that combination in some fashion. And the combination's insistence on dealing exclusively on a blanket or per program basis precludes any user from licensing his needs directly from the members of the combination and therefore eliminates competition among those members.

Now what effect does the 1950 ASCAP consent decree have in removing the anticompetitive restraints which I have just explained?

The answer is simple. It is that the 1950 consent decree has none, none whatsoever. The 1950 decree does not restore plaintiff's access to a competitive market. The 1950 decree does not give plaintiff any possibility of obtaining a competitive price. The 1950 decree does not give plaintiff any possibility of dealing directly with ASCAP members.

The only virtue of that decree is that it affords users, who may not want to buy performance rights in a

competitive market, the option of having a Court rather than ASCAP itself fix the price tag for the blanket license package.

THE COURT: It also requires the giving of a license.

MR. HRUSKA: It also requires the giving of a license.

THE COURT: I don't suppose you would have much trouble in getting it.

MR. HRUSKA: I don't think we would. It requires the giving of a license which is the very sort of license which forecloses our access to competitive markets. In other words, it requires the giving of something we would rather not have if we had any choice about it.

THE COURT: Well, I would put it a different way. It requires giving that. It doesn't require giving the thing that you would like.

MR. HRUSKA: That is true, I will agree with that. The evil complained of in this action, however, is that the ASCAP combination has foreclosed users, plaintiff's other option; the option of being able to buy in a competitive market. It is that option which the Sherman Act guarantees. A combination that destroys it is a combination in restraint of trade. The Sherman Act

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says nothing about judicial rate making procedures operating as a substitute for a competitive market. In fact there is no dispositive difference under the Sherman Act between judicial rate making procedures and rate making by lottery --

THE COURT: Have you suggested that to Judge Ryan?

MR. HRUSKA: I think wehave, your Honor, yes, in one way or another. Neither furnish any semblance of a competitive market which it is the purpose of this act to preserve. Yet the ASCAP defendants, like the Ninth Circuit K-91 opinion which obviously inspired this motion, say how can the ASCAP combination be accused of fixing prices of music when the Court, not ASCAP, is the price fixing authority and when the Court stands ready, willing and able to give plaintiff a fair and reasonable price.

Let me say this. This case turns on whether the ASCAP combination is eliminating competition rather than on whether such elimination of competition fits into one of the per se pigeonholes of the antitrust laws.

But any notion that the defendants in this case are not fixing prices stems from an entirely erroneous concept of what price fixing is. Price fixing is an agreement by competitors not to compete on a price basis

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or to engage in activities that will have that effect.

Such agreement can be implemented by an understanding that competitors will charge, say, $1000 for a ton of oil, if that is the way oil is sold, but that is certainly not the only way that a combination can fix prices.

For example, if competitors agree to buy up distress merchandise so as to support the market price of non-distress merchandise, that is price fixing. That was the Socony Vacuum case.

Likewise if they agree to charge each customer X per cent of the customer's income, that is price fixing.

THE COURT: Is it because you are charged in terms of percentage that you contend there is price fixing?

MR. HRUSKA: No.

THE COURT: Or is it because the members of ASCAP have gotten together and have agreed to accept what you called uniform awards?

MR. HRUSKA: No, that makes it more visible but the price fixing doesn't turn on that. The price fixing turns on the fact that a customer is paying a price which has not been hammered out on the anvil of competition but a price that has been influenced by an agreement,

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understanding among competitors, that is price fixing.

THE COURT: That is what you contend, of course.

MR. HRUSKA: That is what I am contending and that is what I will also contend the law makes very, very clear and therefore if competitors agree that they are all going to charge their customers one per cent of that customer's income, that is obviously price fixing. The price he has paid has not been determined in a competitive market.

THE COURT: Do the competitors all agree they will charge you two per cent, is that what your position is?

MR. HRUSKA: My position is that what they do is just as bad. As a practical matter the consent decree Court has never determined a price for anybody. As a practical matter you go and you negotiate with ASCAP to determine what percentage of your income you will henceforth turn over to this combination in return for acess to their pool and you work as good a deal as you can get and that is it.

But we have to face here in this lawsuit this possibility, even though it may be more imaginary than real, of going through a consent decree proceeding and attempting to prove what the price of music is.

I agree to a large extent with what Mr. Rifkind said about the difficulty of a human being trying to figure out in the abstract how much each piece of music is worth. That is very hard. There is only one way where it is not hard and that is to put that music in a competitive market and let buyers and sellers in that market determine what that price is and if we go to per use terms there will be such a market to look at for the purpose of setting per use rates.

I can see per use rates changing. I can see it modified by the Court and even that withering away but that is for the future.

Now, if all competitors got together and decided they could charge whatever they want to a customer, but that all receipts would be pooled and would be distributed to the sellers, these competitors on some predetermined basis and it doesn't make any difference what the basis is, it could be uniform prices, ununiform prices, anything, as long as it is predetermined and it is not determined by competition, once they do that that is price fixing too although they are theoretically free to charge whatever they want to charge. The fact is they have no incentive to compete because the price they charge bears no relationship to the amount of revenues they will receive.

THE COURT: Aren't you really reducing price

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fixing by your definition -- and I am not saying you are wrong or right either -- to an agreement not to compete?

MR. HRUSKA: Exactly, not to compete on a price basis. That is exactly what it is. And in this case the price paid by each customer has nothing to do, obviously, with any competition amongst ASCAP's 18,000 members because those members don't compete. They are fixing prices virtually in all the ways I just mentioned. They are pooling income.

THE COURT: Aren't you saying, then, by definition it is a price-fixing combination?

MR. HRUSKA: Yes.

THE COURT: And it will be a price-fixing combination if there is such a group under any circumstances?

MR. HRUSKA: Yes, as long as a common licensing agent is licensing music for 18,000 competitors, I don't think that there is a way that that agent can continue licensing that music without stabilizing the price of that music in some way if it is only because the existence of the common agent has physically removed suppliers from the marketplace, removed them from competition, removed them from being accessible and available to their customers.

But I do say that if we get per use terms in this lawsuit there will be competition to a very significant extent, even given the continued existence of the pool.

THE COURT: Okay.

MR. HRUSKA: It is a moderate solution but a very effective solution to a very bad problem and it is a feasible solution.

Let me say this. If the Court administering the consent decree determined a price a user is to pay -- and of course the Court has never done that -- it would still not be a competitive price. There is no difference under the Sherman Act between what is going on now and what might go on in a consent decree proceeding where the Judge determined the fee for a blanket license than if that fee were determined by a roll of the dice.

The crucial point is that the fee is not determined by competition. The fact that the fee might be --

THE COURT: I don't know how Judge Ryan actually operates under the decree and as I say he never had to make the decision but it seems to me you do try to get a meaningful distinction between something achieved as a result of pure competitive forces and something that is described as fair and reasonable.

Nevertheless, I should think that any Judge who was finally called upon to make such a determination would necessarily bear in mind what competitive forces are hypothesized, because they are hypothesized rather than real in determining what his action would be. I don't think he is just going to say, well, CBS is rich and ASCAP is poor, you know.

MR. HRUSKA: I think there is a very good chance--

THE COURT: Base his definition of fair on that.

MR. HRUSKA: I think there is a very good chance of his saying, under those circumstances with respect to any user, I am going to look at what was paid in the past when these two people negotiated with one another. There is that risk.

THE COURT: That is a very good example if somebody decided a matter pendente lite that way.

MR. HRUSKA: I would say this, your Honor, that under the antitrust laws -- and I do not think that there is any difference under the antitrust laws, given the objectives of the antitrust laws to preserve competition, any difference between a judicially determined fee and a fee determined by any other external factor.

THE COURT: I am not taking the position that the K-9 Court is obviously right in its conclusion to that

effect. At the same time I don't think you can brush it aside and say where there is such a structure it means nothing in terms of competition.

Well, let us proceed.

MR. HRUSKA: I would like to hang on that because I do say very categorically that in terms of competition it means nothing. It may mean something in terms of giving fair and reasonable prices to people. Presumably it will be a fair and reasonable price.

THE COURT: It seems to me, Mr. Hruska, that the question isn't whether competition exists under an artificial arrangement but whether the results achieved under the artificial arrangement would give the same protection to the consumer. That is a reasonable analysis of the meaking of the whole thing.

MR. HRUSKA: Except I th ink it is very apparent that if a consent decree judge were to attempt to determine what a competitive market level was, he would be doing that in a vacuum because there never has been any competition in this market. He can look to the price that movie companies pay whenever they deal directly with ASCAP members and they can because they have plenty of time in planning a film to go all over the world looking for a writer to write the music for them and we can look

at that market and that would be instructive but there isn't much else. Even though, with all the good intentions in the world, even if the consent decree said reasonable price means competitive market, but it doesn't say that, but even if it said that I don't know where a judge would turn. What evidence would he get? It is doing it in a vacuum. An objective which is obviously unrealizable is not much of an objective.

We have also discussed in our brief why the various activities of which we complain constitute trying and boycotting and we have argued the same points before on the BMI motion, where we argued them extensively, and I wouldn't plan to repeat all those arguments here unless the Court wishes me to do so.

THE COURT: No, I don't think that is necessary.

MR. HRUSKA: But I would like to make a couple of brief points, not really new points, but another way of looking at it, on the tying violation.

If I were to approach ASCAP tomorrow and ask for a license for 25 of the 50 songs that CTN was planning to use on Thursday, the inevitable response would be we don't license music in that fashion. You can take or leave a blanket license for a period of years. In other words, my right to license the 25 songs I want to license

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will be conditioned upon my willingness to accept a blanket license to the entire pool. Thatis tying and there is no difference between that and what ASCAP insists upon at the beginning of any new licensing period.

There is obviously leverage being exerted. If there wasn't, no user who is able to do so, that is no large scale user would ever give up its right to license a portion of its needs directly from writers and publishers. And that leverage is my need for the 25 songs on Thursday, the 25 songs I wouldn't get in time from the copyright proprietors, and the 25 songs I need on Friday and so on.

Now, Mr. Rifkind has said that this is a simple case. I have never thought, personally, that the analysis of a lawsuit was furthered particularly by calling it simple but I would agree to this extent that there is a simple, and I think accurate way of unraveling it. It is basically this, and I have alluded to it before.

This combination has two ways to deal with us, and that is on a blanket basis which destroys competition and on a per use basis which permits competition to a significant degree.

Why are they so fearful of that per use alternative? Why are they defending this case which now

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seeks only that moderate solution with so much heat and vigor? What are they afraid of? I think the answer is obvious. They don't want to compete on a price basis because the advantages of not competing on a price basis are very apparent to them just as they have been apparent to every other price fixing conspiracy which has been taken apart by the Courts. I think that the effects of this combination and the anticompetitive position which they insist on preserving must be remedied and this motion be denied.

Let me turn to my Rule 9-G statement.

THE COURT: I don't want to deal with what is stated in the rules but what you contemplate the trial on liability being about.

MR. HRUSKA: Okay.

THE COURT: If you want to take off from the Rule 9-G statement --

MR. HRUSKA: I think the basic issue, your Honor, in a trial of this case is whether or not we are being deprived, realistically deprived of the opportunity of dealing directly with ASCAP members. Now that comes about in a variety of ways.

THE COURT: You claim you are and you say that Judge Rifkind says you are not and you are entitled to

prove that you are?

MR. HRUSKA: That is right, and that is made up of a number of components.

For example, we say that this ASCAP pool consists of music which would be accessible to us and music which would be inaccessible. We say that that, and I think your Honor knows what I mean by the words accessible and inaccessible; we have used them in this lawsuit many times.

THE COURT: I have an understanding. Accessible music is there you can get the composer to make an arrangement.

MR. HRUSKA: Yes.

THE COURT: And inaccessible is where you cannot have it accessible.

MR. HRUSKA: We also say that that inaccessible music is indispensable to us.

THE COURT: Or at least some of it.

MR. HRUSKA: Yes, but you can take it in gross and certainly all of it is.

THE COURT: You couldn't get along without some.

MR. HRUSKA: We couldn't get along with it, that is right.

Now, of course, ASCAP says, well, sometimes I

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think they are agreeing with that point, but when you start analyzing it, what they say, I am not so sure they are agreeing. I think they have admitted it in one form or another and I would like to make very sure that that admission sticks in this case but they always keep coming back to the point that since we need ASCAP so badly then we ought to be content with this anticompetitive way that they decided to license their music.

THE COURT: What you are saying is you don't need ASCAP, you need the music.

MR. HRUSKA: Well, that's right. We do need the music and I am also saying we wouldn't even require that music, all of it, if there weren't ASCAP. In other words, our competitive requirements for the music have been created by the act of combining of putting together this pool and making it available to our competitors. The important point here is we would not need ASCAP if ASCAP did not exist.

Judge Rifkind is wrong when he says that we would certainly have created an ASCAP if ASCAP didn't do it itself.

THE COURT: Well, I don't think the question of whether you would or wouldn't need ASCAP is really controlling here. It seems to me the controlling

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question is whether you have the right to have ASCAP and its members to deal with you in a different way than that which they are and if it turned out to be a victory that is your worry and if it is legally required then it has to be whether it is helpful to ASCAP or not and if it is not legally required it is too bad for you.

MR. HRUSKA: I think that is the basic factual issue in the case. I can go on but that is the guts of it.

Are we or are we not being deprived by this combination of access to a competitive market? I think clearly we are. I can read portions of Mr. Finkelstein's deposition which I think make that very clear and, by the way, I would also state that Mr. Finkelstein's statement that, yes, you could get all this music if you want to pay the price for it in dealing directly, which is something referred to in the ASCAP reply brief, as removing all these admissions Mr. Finkelstein made and which we quote in our initial brief has no such effect. I think the Court must read this.

What I am saying, though, that even on this motion I think there is an issue of fact presented. I don't want to be in the position of conceding that I didn't think we have not already proved that fact.

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THE COURT: Well, I will not waste time on something that is already proven.

You state in No. 2 of the affirmative contravention items, that is on page 4 of your 9-G statement, that ASCAP has failed to afford licensees a genuine choice. I asked earlier when Judge Rifkind was arguing whether the decree didn't simply require a choice between the per program and blanket and I think you agreed that that is all the decree does. I take it you were adopting the phrase, "genuine choice" simply because its overtones may suggest perhaps they are obligated to do something more than that. You are not claiming, in other words, they are not complying with the decree in that regard?

MR. HRUSKA: That is not an element of this lawsuit. The only reason I put this in is because under the rules, if you don't agree with a statement made in your adversary's Rule 9-G statement you have to state your disagreement or you are deemed to admit it. I don't think they offer a genuine economic choice between a blanket and per program license but I don't think that is terribly important to the outcome of this lawsuit.

THE COURT: Does the 9-G statement of the defendants say that they are offering that economic choice?

MR. HRUSKA: Yes.

THE COURT: It doesn't say that in so many words, does it?

MR. HRUSKA: I will have to get it out.

THE COURT: The 9-G statement of the defendants is they do say they do not contend that ASCAP has failed to comply --

MR. HRUSKA: That's right.

THE COURT: I take it that is agreed?

MR. HRUSKA: It is not an allegation in the complaint of this lawsuit that ASCAP is failing to comply.

THE COURT: Before me you are not saying they haven't lived up to their judgment, you are saying the fact that they have lived up to the judgment is no defense to a claim they are required to do something beyond the judgment?

MR. HRUSKA: That is right.

THE COURT: Okay. Thank you, Mr. Hruska.

MR. RIFKIND: May I have a few minutes?

THE COURT: Yes.

MR. RIFKIND: To work backwards I will start with the last item mentioned. When I read the words, "a genuine choice" I assum d that the quotation marks to which it laid claim were derived from its presence in the decree and therefore I took it to be as used in the decree

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and of course I now understand that it is not asserted that we have violated the decree. Whether means something else is not now asserted.

I do not think, your Honor, that counsel has pointed your eye to a triable issue of fact. He gave you various hyptheses and he talked about the words he used, where the issue is, whether or not they are being deprived of an opportunity to deal with members of ASCAP, but that is a logical conclusion to be derived from the language of the decree and the language of the various program licenses. It is not something upon which you can put a witness on the stand and ask your questions, did you or didn't you on January 22nd do as follows:

I therefore assert that there is no difference with respect to the facts relating to this case, nothing which need disturb your Honor as far as triable issues are concerned. I am not suggesting that that makes it inevitable that you decide the law my way. All I am saying is that there is nothing to try and when I said at the beginning something about it being simple -- and I didn't say this was a simple case -- and I think my learned friend may have misheard me or perhaps I inadvertently spoke that way. I don't think so.

I never thought of it as a simple case. I said

the story was a simple one. The facts are simple because they are not controverted. I did go on to say that the case has been made complex beyond words but I attributed those to the skillful art of the legal profession and not the facts of the history.

Now, a few points that I think need making. My friend said something about that if there were no ASCAP, CBS and NBC would be on an equal fotting because neither of them would have to have recourse to music which they couldn't find. But, of course, it doesn't necessarily follow that if CBS couldn't find it that NBC couldn't find it or vice versa. Also I am wondering what he meant when he said they are on equal footing.

Supposing NBC started to acquire exclusive licenses from composers in the absence of ASCAP, would CBS be then on an equal footing if the NBC stable consisted of all the popular writers of the day and CBS had none of them or would there then be a price competition which would make the present license fees look like chicken feed? That is another matter. All I am saying is that ASCAP is here and I have not heard it suggested it be abolished so therefore we must consider the story in the light of that fact.

I don't know the significance of the words used

by Mr. Hruska that since the ASCAP pool exists, therefore it becomes indispensable because it is available to the competition and therefore they must have access. I assume that is true of almost everything connected with television. I suppose CBS would be greatly disadvantaged if NBC had color and CBS did not. I don't know how that would throw light upon the problem of the case we are involved in.

I suppose if CBS had studios and NBC didn't for some reason that would be a serious problem for them. I don't quite understand what is meant by saying that if the composers didn't make their wares available, kept them hidden and of course neither side would have to use it. That is true. I suppose that is true about the Lost Rhapsody or the Abandoned Harmony that we always find somebody who goes through somebody's cellar and finds a new song by somebody.

But, of course, as long as it is unknown to the world no competitors have to have access to it. But to suggest that ASCAP make this body of music that is in the catalog available otherwise it would have been buried, that seems to me is rather a strange view of history.

My friend used the words "paying twice," that is if you make a deal, he said, if you make a deal with a

composer and you would have the license you would be paying twice.

I would like to ask Mr. Hruska whether he can point to a case where anybody has ever paid twice. According to the records we have in those per program licenses that are outstanding there is no charge for an otherwise licensed song. In other words, the user pays only for those compositions that are licensed to him by ASCAP.

Now, I can visualize lots of arguments why that shouldn't be so but the fact is that is the way it is. I can conceive of an argument if CBS wants to buy retail it should and if it wants to buy wholesale it should and if it wants to deal with composers it should not take either a per program or blanket license but we have never done that.

THE COURT: With regard to that, you say they pay only, or words to the effect they pay only for the songs it was going to play or something like that, as I understand a per program license, and I would like to get this straight once and for all in my mind.

MR. RIFKIND: I will try.

THE COURT: I am not criticizing you. It seems to be differently viewed on both sides.

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If I want a per program license I pay you a flat fee?

MR. RIFKIND: No, your Honor.

THE COURT: Or a flat percentage?

MR. RIFKIND: You get a license which is called a per program license.

THE COURT: For which I pay, as I understand it?

MR. RIFKIND: You pay only as you use music. You don't pay in advance.

THE COURT: I get the license. Let's rehearse it.

MR. RIFKIND: You have a license and you pay nothing.

THE COURT: Now I decide on Monday night, let us say each week for the rest of the year, 52 programs, I will want ASCAP music. I may decide that my program will be a half an hour long, let us say.

As I understand it, depending on how large an outlet I am or whatever it is I will then reach an agreement with you that I may have music for those programs?

MR. RIFKIND: No, sir; no, your Honor. It is much simpler than that. Let me try to explain it.

THE COURT: Would you, please?

MR. RIFKIND: I want a per program license and

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there are one or two outstanding, aren't there?

MR. HRUSKA: Less than one per cent.

THE COURT: Even if there are none I would like to know.

MR. RIFKIND: This is the way it is done and I have been before Judge Ryan and we have negotiated out per program licenses.

I apply for the per program license and I sign it.

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THE COURT: Right.

MR. RIFKIND: Then the letter says suppose I have done that on January 1st. Throughout the month of January I have not played any music. I pay nothing. February goes by and I have played no music and then I pay nothing. In March, without notice to anybody, without anybody's consent, the producer says tonight I am going to play When Irish Eyes Are Smiling on the 17th so you put on a program that night playing When Irish Eyes Are Smiling.

THE COURT: That is not yet in the public domain?

MR. FINKELSTEIN: No, and the composer is still alive.

MR. RIFKIND: Now at the end of that period of time, monthly or quarterly, at the end of that month CBS would furnish a report to ASCAP. On that report, assuming it had the per program license it would say, March 17th, When Irish Eyes Are Smiling and that the charge for the program in which it was played was $300.

THE COURT: How would that $300 --

MR. RIFKIND: Of the $300 you compute, you take off a various items of deductions, I forget what they are. The amount is not the full charge to the advertiser, it is a constructed price and of that I think you pay 8 per cent.

MR. FINKELSTEIN: Individual stations pay 8 per cent.

THE COURT: If CBS wanted to play 10 pieces on that program that night they would have paid the $300?

MR. RIFKIND: Yes, there is no question about it. The second and third and fourth cup of coffee is free.

THE COURT: I know there is a place that gives you a bottomless cup of coffee. There was a restaurant I used to eat at when I was downtown where they had a bottomless cup of coffee.

MR. RIFKIND: That is the way the per program license works. But nobody in history will not reveal a case, and I am sure that my facts are right, that Mr. Hruska cannot produce a case where any per program user was compelled to pay twice, that is for his fee for When Irish Eyes Are Smiling and the per program license and that is he also paid the individual composer anything for that, even though you made a separate contract with him.

Now, Mr. Hruska said where do I get this notion, absurd notion that they intend to use the per use license as an economic club? He said where did I get that fanciful idea? Well, your Honor, I won't take time to read it but please -- the reporter will record it if you will read pages 7 and 8 and 9 of the plaintiff's brief you will see the club described in detail with all its potential for oppression, suppression and evil, in detail and exactly the way I

described it to you on my argument.

Now says Mr. Hruska, why doesn't the composer say he is going to get more money than the ceiling and the way he is going to do it, he is going to say to Mr. CBS, although the per use price is $100 I want you to pay me $200 and if you say to me you are going to go and get it from ASCAP, why I am going to tell ASCAP not to license you that song. So, your Honor, I will read to you the following. I am going to read from the amended consent judgment of 1950. I will first call your attention to the fact that article 3 provides --

THE COURT: I have got a copy of it.

MR. RIFKIND: Article 3 provides that the provisions of the judgment are applicable not only to the society but to its members. That is very important.

And now I ask you to read paragraph H of article 4.

THE COURT: What page is that?

MR. RIFKIND: It is on page 3. That is ASCAP, which includes its members, are enjoined and restrained from asserting or exercising any right or power to restrict from public performance for profit by any licensee of ASCAP any composition in order to exact additional consideration for the performance thereof. So that which my friend said he would do and the composer would do is prohibited by the decree

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and he can't do it unless he wants to be guilty of contempt.

There was some reference to the fact that my soliciting your Honor's attention to the size, magnitude and power of CBS was irrelevant. I say it is not irrelevant in the circumstance in which I use it, namely since the Sherman Act does not prohibit every restraint of trade but only every unreasonable restraint of trade. Then in judging any restraint of trade you must consider it in the live context in which it occurs and in the live context in which it occurs I showed you that we had a so-called competitive market in which on one side was this giant, CBS and on the other side an atomized group of composers.

I notice that each time my friend speaks of ASCAP he speaks of it as 17,500 corporations. Well, of course there are corporations in ASCAP but your Honor will take judicial notice that most of them are authors and composers and we will deal with that.

THE COURT: Yes.

MR. RIFKIND: He should say, by the way, as far as getting a choice, in the last decree under which CBS has operated, the one expired in 1969, of course there had been an adjudication that there was a genuine economic choice per program or else Judge Ryan wouldn't have signed the decree.

THE COURT: I saw where the parties agreed on the

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fee and it was so ordered. I don't know if the judge used that language.

MR. HRUSKA: No, your Honor.

What happened on the last fee was that ASCAP submitted a form of order which might have had the effect of proving the fee as reasonable which was against the provisions of an agreement we had with ASCAP in which the amount of that fee was not to be used in the future for any purpose, without prejudice to both sides. We moved to have Judge Ryan change the language of the order. Judge Ryan refused to do so. We brought on a petition for mandamus, certiorari and appealed. The reason for that was the procedures were complicated as to the right to review this form of order, and on the eve of the argument before the Court of Appeals ASCAP did what we had asked them to do from the beginning and which we had told them if they did do we would not appeal, mandamus or anything else, which is to sign an agreement saying that that order had no res judicata or collateral estoppel effect.

MR. RIFKIND: Be that as it may it is still true that the judgment of 1950 requires the judge presiding in the rate making proceeding to ascertain that the choice is a genuine one.

My friend said that the Sherman Act said nothing

about judicial rate making and, of course, I don't remember any words about judicial rate making. But it is suggested to you that there is something extraordinary about a judicial decree in an antitrust case which provides for judicial supervision of the prices subsequently to be charged, then I must have recourse to some personal experience.

My recollection is that it was in the National Lead case, U.S. v. National Lead but I may be wrong, which I happened to write and in which we of course provided for compulsory licensing of users of patents with provision for judicial determination of the correct royalty. And, of course, that pattern I did not invent, your Honor, in U.S. v. National Lead. I copied it from very distinguished predecessors and of course it is a very common practice and it has been in the United States Supreme Court many times because National Lead was in the United States Supreme Court, of course.

And to suggest now that even one of these judicial decrees, of which there must be thousands in the archives of the courts every one is a violation of the antitrust laws--

THE COURT: Let me clear that up. I don't want a nod from the head of Mr. Hruska if I analyze his view of the matter. I don't think he contends there is anything wrong with the structure created but it simply does not automatically assure a competitive price as a result of it.

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MR. RIFKIND: Oh, yes, I understand that. The whole purpose of judicial rate making in these cases, where it is impractical to do otherwise and where the necessities of the situation make it necessary, and since the law is supposed to be a living institution, is to withdraw and cancel the power for abuse that one of the parties may have.

THE COURT: To disinfect.

MR. RIFKIND: The Sherman Act is designed to stop the abuse and the judicial remedy is supposed to be that. It is supposed to be a rate which in the judgment of the court is obtainable absent the improper power which one of the parties to the transaction has.

Now, the fact that in the 30-year history that we are dealing with it has never been necessary for the judge to actually make a rate finding speaks well for sensible arrangements built into this decree because in each case the parties, and certainly you would not say that one is an abused party unrepresented uneducated, an 18-year old infant or anything of that kind. Both parties are well represented and both skillfully have arrived at a common, sensible solution. That to me is the greatest guarantee of its propriety and fairness and it is what it would have been had there been open competition which could not be.

So the fact that Judge Ryan has never entered an

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actual rate price which he has determined speaks well for rather than against the system.

Mr. Hruska gave you the illustration where he called up ASCAP and said I want a license for 25 songs to play next Thursday and he couldn't get it. To put it in the form in which he put it he couldn't get it but he would call up and say "I want a per program license and once he got that he could play the 25 songs that he wants to and he would pay only for those 25 songs and if he never used that license again he would never pay another dime to ASCAP.

THE COURT: Judge, I can't accept your statement that he pays only for the 25 songs. He pays only a price which permits him to use the 25 songs or the 50 songs.

MR. RIFKIND: Or 50 or 25.

THE COURT: It depends. I don't know whether this would be triable or not.

MR. RIFKIND: A program doesn't run on for a week.

THE COURT: No.

MR. RIFKIND: We are dealing with a living situation. They run for 15 minutes or 30 minutes.

THE COURT: I realize that but in the context in which you said it--

MR. RIFKIND: It is like saying, it is like the cup of coffee situation or reading a book in a library, you

can go in for a quarter and read as many as you like. How many books can you read in an hour?

I get back to the question I started with as to what issue will we try and I say I haven't called any issue to your attention to be tried and Mr. Hruska hasn't called any issue to your attention to be tried. There is no issue of fact to be tried. There are difficult questions of law to be decided but the facts are all before you.

THE COURT: Thank you, Judge Rifkind.

Mr. Hruska?

I am satisfied but if there is something you want to say in about three minutes I will be glad to hear it.

MR. HRUSKA: I will say it. I think I have taken about 45 minutes less time than Mr. Rifkind.

THE COURT: Yes. I am not suggesting I am being unfair in that.

MR. HRUSKA: I would like to say just a few more words on this per program license because I think some of the significant aspects of that license have gotten confused in the last few moments. Under that license the licensee must pay ASCAP the same fixed percentage of income, program income for a program using any string of ASCAP music, the license says any amount, in whole or in part, the same percentage of a program of that nature as for a program using 30 or

40 solid minutes of ASCAP music. Now the practical effect of that hasn't been brought out at this point. Obviously in the first place most all of our programs use ASCAP music. The pool is just too large to avoid and so the net effect is we are really getting a blanket license and paying more money for it. The going rate for a per program license is 9 per cent and the blanket license is 2 per cent and there is about 1 per cent of broadcasters in this country that have taken a per program license for that reason. They are pretty good for a talk radio station but beyond that you are paying more money.

Theoretically given a variety program using 15 ASCAP compositions we might attempt to negotiate direct licenses for all 15 of them so as to avoid this floating lien of the per program license. But knwoing full well in virtually all those cases it is going to be impossible to get direct licenses, no businessman in his right mind will even make that attempt. He would end up paying money to the writers and publishers of maybe 10 songs plus the expenses of negotiating with those people and then have to pay ASCAP the same per program fee he would have paid in the first place. In other words, he would be paying twice for the same music.

Judge Rifkind challenged us to point out a case where CBS or

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anybody else has paid twice for the same music. People do not ordinarily engage in self-defeating behavior. Of course we don't pay twice for the same music. We are not that stupid, nobody is and that is the wall that blocks the entry to a competitive market. Also given a broadcaster with a per program license wanting to go out and trying to escape this floating lien that attaches with any strain of music used in that program, the very terms of that per program license would introduce some pretty artificial factors in any such negotiation. The parties would negotiate not with an eye to competitive market levels but with an eye to how much CBS can save on that per program license fee if Mr. Writer or Mr. Publisher licenses the music and if that writer or publisher happens to be some of the few down the end of the line. In other words, going back to my former hypothetical example of getting 10 songs out of 15 on the eve of a program, those last few songs, the writers of those songs have an artificial bargaining position attributable to th terms of the per program license. And knowing that, knowing those factors just adds up to another reason why no television network would either attempt to deal with writers and publishers under a per program license or in reality take such a license to begin with.

Now the word impractical was used. This is the

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first time, really, that there has been any statement about a per use license ~~that~~ being impractical. I am not quite sure if Mr. Rifkind meant to apply it squarely to a per use license. There is no evidence in this case that it is so. In fact it goes the other way.

You talk about reasonableness of this consent decree result as relevant to the fact tnat reasonable restraints of trade are permitted under the Sherman Act. Well, we are talking here about the elimination of competition on a monumental scale, 18,000 people and I never said they were all corporations, 18,000 businessmen, whether they are corporations or individuals, foreclosure of competition among that large a group is a per se violation of the Act.

We don't have to concern ourselves with whether what is going on is reasonable, whether it is a reasonable restraint. This is an unprecedented restraint and it is obviously a per se restraint.

A statement was made that the court approved the fact or found the fact that there was a genuine economic choice offered CBS in the last round in the consent decree negotiations. By virtue of that order -- I discussed before the subsequent history of the order -- and let me just say that was a settlement and there was no per program offer made or I think even discussed and the court didn't have occasion

to approve any availability of a genuine economic choice between a per program and a blanket license. The subject was just never raised and obviously per program licenses are totally unfeasible. They don't accomplish anything more than the blanket license. They foreclose us from entering into this competitive market just as effectively.

THE COURT: All right, thank you very much, gentlemen. I have plenty of thinking to do as I have had throughout the case.

Service of 1 copy of the within 24-volume Joint Appendix is hereby admitted this 18th day of May, 1976.

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